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Re: Grunstein v. Silva
C.A. No. 3932-VCN
Date Submitted: February 21, 2011

Dear Counsel:

Defendants seek certification of their interlocutory appeal of the Court's order denying them summary judgment on all of Plaintiff Leonard Grunstein's claims as barred by *res judicata* or, more precisely, that doctrine's application to "claim splitting."[1]

[1] *See Grunstein v. Silva*, 2011 WL 378782, at *7-*8 (Del. Ch. Jan. 31, 2011) (the "Memorandum Opinion"). For convenience, the Court will use the nomenclature employed in the Memorandum Opinion.

Defendants contend that the Court's decision to allow Grunstein's claims to proceed despite the judgment against MetCap in *MetCap II*[2] was incorrect for two reasons: first, they assert that the Court did not properly apply the transactional view of *res judicata* that was recognized in *Maldonado v. Flynn*[3]; and second, they argue the Court wrongly determined that Grunstein was not in privity with MetCap for purposes of a *res judicata* analysis. For the reasons discussed below, the Court will deny the Defendants leave to take an interlocutory appeal.

Supreme Court Rule 42(b) provides that "[n]o interlocutory appeal will be certified by the trial court or accepted by [the Supreme Court] unless the order of the trial court determines a substantial issue, establishes a legal right, and meets one of" several enumerated criteria, including that "[a] review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice."[4]

The Court's decision to deny Defendants' summary judgment motion based on the doctrine of *res judicata* turned on factual inferences that may be fairly

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[2] *MetCap Sec. LLC v. Pearl Sr. Care*, *LLC* 2009 WL 513756 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (Del. 2009) (TABLE).
[3] 417 A.2d 378 (Del. Ch. 1980).
[4] Supr. Ct. R. 42(b)(v); none of the other enumerated criteria would be applicable.

disputed on the existing record. Thus, no substantial issue was resolved.[5] While the determination that Grunstein's claims may proceed to trial may be viewed as establishing a legal right, interlocutory review would neither terminate the litigation nor serve the considerations of justice within the ambit of Supreme Court Rule 42(b)(v).

The Court now turns to Defendants' objections to its *res judicata* ruling, the first of which concerns the question of whether the Court properly applied the transactional view of the doctrine.[6] It is undisputed that the present dispute arose out of the same transaction that was involved in the *MetCap* litigation: the Beverly Acquisition.[7] Thus, if the Court had determined that the record before it indicated, as a matter of law, that Grunstein is in "privity" with MetCap and that his individual claims, in fairness, should have been asserted in the earlier action, the Defendants

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[5] *See Aetna Life & Cas. Co. v. Sinex*, 1989 WL 114320, at *1, 567 A.2d 418 (Del. 1989) (TABLE) ("[B]ecause the underlying facts are in dispute, the ruling does not determine a substantial issue . . . thus not meeting the criteria of Rule 42(b).").
[6] *See id.* (endorsing the transactional view of *res judicata*).
[7] *See* Memorandum Opinion, 2011 WL 378782, at *1-*5; *MetCap I*, 2007 WL 1498989, at *1-*3.

would have been entitled, under the doctrine of *res judicata*, to summary judgment on all of Grunstein's claims in this action.[8]

The factor that resulted in denial of the Defendants' *res judicata* argument was not that the Court declined to apply the transactional view of *res judicata* and instead applied collateral estoppel, but instead, that the undisputed facts before the Court on the Defendants' motion did not conclusively establish privity between Grunstein and MetCap such that any form of preclusion could (or should) act as a bar to his claims.[9]

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[8] *See Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *8 (Del. Ch. Nov. 24, 2009); *see also LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 193-94 (Del. 2009) ("[T]o assert *res judicata* as a bar to a plaintiff's claim, in addition to showing that the same transaction formed the basis for both the present and former suits, the defendant must show that the plaintiff neglected or failed to assert claims which in fairness should have been asserted in the first action.").

[9] To the extent that the Defendants have argued that Grunstein is in privity with MetCap for purposes of *res judicata* by virtue of his ownership interests in that entity, § 59 of the Restatement (Second) of Judgments was cited only to demonstrate that mere ownership in a closely held corporation does not necessarily require the application of claim preclusion:

> Except as stated in this Section, a judgment in an action to which a corporation is a party has *no preclusive effects* on a person who is an officer, director, stockholder, or member of a non-stock corporation . . . .
> (3) If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation or the holder of ownership in it is conclusive upon the other of them *as to issues determined therein* . . . .

Restatement (Second) of Judgments § 59 (emphasis added). Instead, showing something more—such as demonstrated day-to-day control or a close alignment of the individual's and the entity's interests—is necessary before it will be deemed fair for claim preclusion to apply. *See Aveta Inc.*

Although the Defendants have argued that the record "easily" meets the standard for finding Grunstein and MetCap in privity on summary judgment, the degree of control Grunstein exercised over MetCap and the degree to which their interests were aligned are issues of fact that remain in dispute.[10] Because the Court could only apply *res judicata* to bar Grunstein's claims if it resolved the factual issues concerning privity in the Defendants' favor, it could not grant the motion for summary judgment on that basis.

Nonetheless, the Defendants have presented a plausible version of the facts pertaining to claim splitting: in a different procedural posture that does not require

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*v. Cavallieri*, 2010 WL 3681011, at *18 (Del. Ch. Sept. 20, 2010); *Kohls v. Kenetech Corp.*, 791 A.2d 763, 769 (Del. Ch. 2000) *aff'd,* 794 A.2d 1160 (Del. 2002) ("[B]ecause the term [privity], except in reference to specific legal relationships, 'is so amorphous . . . it often operates as a conclusion rather than an explanation.' In the preclusion analysis, even a legal relationship such as husband and wife 'does not [alone] justify imposing preclusion on one of them on the basis of a judgment affecting the other.' Rather, 'preclusion can properly be imposed when the claimant's *conduct* induces the opposing party reasonably to suppose that the litigation will firmly stabilize the latter's legal obligations.'").

[10] For example, Grunstein contends that MetCap is entirely run by Murray Forman, that his interests and MetCap's diverged because MetCap sought a fee and Grunstein sought an equity interest, and that he was justified in not bringing his individual claims at the time of the *MetCap* litigation because his alleged partner, Plaintiff Dwyer, was not yet ready to sue at that time. Summ. J. Hr'g Tr. at 35, 47-48. In short, Grunstein has asserted facts suggesting that his relationship with MetCap is not as close as the relationships described in the cases cited by Defendants, or that fairness does not indicate that he "should" have brought his individual claims in the earlier action. Grunstein might or might not be successful in advancing these contentions at trial; regardless, they could not be rejected on the summary judgment.

the drawing of all factual inferences in favor of the non-moving party, Defendants might be able to adduce evidence sufficient to support findings that Grunstein and MetCap *are* in privity and that fairness did require Grunstein to bring his individual claims in the prior litigation. At this stage, however, the Court's role is not yet that of a fact-finder.

Finally, even if the Defendants are successful with an interlocutory appeal, Dwyer's claims will nonetheless remain, and this litigation will continue. The trial, limited to the claims of the one remaining plaintiff, would be simplified, but a benefit of that nature almost always follows if summary judgment is granted instead of denied. That universal observation, however, does not encompass the "considerations of justice" notion animating Supreme Court Rule 42.

Accordingly, the motion for certification of an interlocutory appeal will be denied. An implementing order will follow.

Very truly yours,

***/s/ John W. Noble***

JWN/cap
cc: Register in Chancery-K