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Re: Lane v. Cancer Treatment Centers of America, Inc.
C.A. No. 12207-NC
Submitted: May 17, 2002

Dear Counsel:

I write to address two related evidentiary matters from the trial of this action to appraise the value of Petitioner Lane's shares in Cancer Treatment Centers of America, Inc. ("CTCA") as of its merger in 1991.

The first question involves the admissibility of the audit letters accompanying various corporate financial reports which were issued after the merger.[1] The parties agree that the financial reports are properly before the Court, but Petitioner objects to the Court's consideration of these audit letters which may be read as casting doubt on CTCA's continued business relationship with a related entity, Memorial Medical Center and Cancer Institute, Inc. ("MMC"), and the likelihood that a substantial receivable from MMC would be paid.

The second issue is spawned by Respondent's invocation of the principles of collateral estoppel to bring before the Court certain factual findings of an

[1] Respondent's Exhibits 57-59.

Oklahoma court in an appraisal of Petitioner's shares of MMC. MMC and CTCA both lost their independent corporate status through merger on the same date. Respondent presumably seeks to employ certain of the Oklahoma court's findings of fact to advance its arguments regarding both the continued viability of MMC, one of CTCA's major business associates, and the collectibility of the relatively large receivable.

Both issues arise from application of the general principle that the scope of the Court's inquiry in an appraisal action is limited to those facts "'which are known or susceptible of proof as of the date of the merger and [are] not the product of speculation.'"[2] Petitioner opposes the Court's consideration of both the Oklahoma decision and the audit letters because they were all written after the merger and could not have been known to anyone, including the theoretical prospective purchaser, as of the merger date.

"'Pursuant to the doctrine of collateral estoppel, if a court has decided an issue of fact necessary to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case.'"[3] In general, a Delaware court, when asked to give collateral estoppel effect to the factual findings of the courts of another state, will look to the law of that state because "a Delaware court must give the judgments of another state court the same preclusive effect as would a court in that state.'" Under Oklahoma law, a party seeking to invoke collateral .estoppel principles must demonstrate the following four elements:

> (1) the issue previously decided is identical [to] the one presented in the action in question;

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[2] ***Cede & Co. v. Technicolor, Inc., 684*** A.2d 289,297 (Del. 1996) (quoting ***Weinberger v. UOP, Inc., 457*** A.2d 701,713 (Del. 1983)).

[3] ***M.G. Bancorporation, Inc. v. Le Beau,*** 737 A.2d 513,520 (Del. 1999) (quoting ***Messick v. Star Enter., 655*** A.2d 1209, 1211 (Del. 1995)).

[4] ***Columbia Cas. Co. v. Playtex FP, Inc., 584*** A.2d 1214, 1217 (Del. 1991).

(2) the prior action has been finally adjudicated on the merits;

(3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication; and

(4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.'

Petitioner. does not dispute that the Oklahoma action has been finally adjudicated on the merits or that he was a party in the Oklahoma action. Similarly, he does not contest that he did have a full and fair opportunity to litigate the facts resolved by the Oklahoma court. Petitioner, however, does maintain that the issue decided in Oklahoma is not identical to the issue which is before this Court. It is true that the Oklahoma court dealt with the value of MMC. However, facts determined in the Oklahoma litigation may be helpful to the Court in determining what value is appropriately assigned to CTCA. Indeed, the facts found by the Oklahoma court are, at least in general, facts which will need, given Respondent's view of the case, to be determined here. Thus, the facts that must be resolved are the same in both fora and merely because the "ultimate issue" is different does not compel a finding that collateral estoppel cannot properly be applied in these circumstances.[6]

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[5] *Smith v. State,* 46 P.3d 136, 138 (Okla. Crim. App. *2002); see also National Diversified Bus. Servs., Inc. v. Corporate Fin. Opportunities, Inc.,* 946 P.2d 662, 666-67 (Okla. 1997).

[6] I do not understand Oklahoma law on issue preclusion to deviate in any material fashion from the comparable law of Delaware. In Delaware, a party may invoke the collateral estoppel doctrine if it can demonstrate that "(1) a question of fact essential to the judgment (2) [was] litigated and (3) determined (4) by a valid and final judgment." *M.G. Bancorporation, Inc. v. Le Beau, 737* A.2d at 520.

In sum, I am persuaded that the factual findings of the Oklahoma court are, as a general matter, properly considered by the Court in this proceeding pursuant to the principles of collateral estoppel.

Petitioner, however, raises two other related challenges to the application of the collateral estoppel doctrine in this appraisal action. First, Petitioner asserts a general argument that collateral estoppel should not be employed. Second, Petitioner argues that the Oklahoma findings are the result of events occurring after the merger and, thus, run afoul of the standard that post-merger events may generally not be considered in an appraisal action.

Collateral estoppel has been approved for use in Delaware appraisal actions.[7] Petitioner seeks to distinguish *M.G. **Bancorporation*** by noting that the appraisal action benefited from application of collateral estoppel principles because the prior proceeding had involved allegations of fiduciary duty breach arising from the same transaction. In this matter, the Oklahoma court was not concerned with the value of CTCA but, instead, was valuing a related corporation, MMC. I can find, however, nothing in ***M. G. Bancorporation*** or our jurisprudence suggesting that, in appraisal actions, collateral estoppel may only be used in companion appraisal/fiduciary duty actions. Indeed, the very reasons for issue preclusion – efficiency and conservation of scarce judicial resources – counsel in favor of accepting another forum's factual findings in appraisal proceedings under the same conditions as other actions, assuming that the facts are found as of the date of the merger.

As to Petitioner's argument that the Oklahoma decision constituted a post-merger fact that should be excluded, I first note that this case is unique in that the MMC merger resulting in the Oklahoma litigation and the CTCA merger occurred on the same day. In addition, that the Oklahoma court would make such factual findings could not have been known as of the merger date, but it is not the fact that the Oklahoma court made factual findings that counts. The facts that count are

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[7] ***See, e.g., id.*** **at 5 19-21.**

those that the Oklahoma court found. More importantly, they are facts based on that which was known as of the merger date because that is the nature of fact-finding in an appraisal action. Thus, because the Oklahoma court found its facts as of the merger date, in the context of an appraisal action and from a limited factual universe, those findings are not "post-merger facts" that should be excluded.

In short, the Oklahoma court's factual findings are no more post-merger facts than the factual findings that I will eventually make. Both were, or will be, tied to what was known or knowable as of the merger date. Therefore, the Oklahoma factual findings shall not be excluded simply because the fact-finding was, by necessity, a post-merger event or because this is an appraisal action.

As to the audit letters, the opinions expressed in those letters did not exist as of the merger date. Those opinions, however, were based on an interpretation of the financial reports which the parties have agreed are admissible. There are no post-merger facts from those which the Respondent seeks to have the Court consider. Instead, Respondent asks the Court to consider a post-merger opinion based on facts as of the merger date. Opinions in many forms – some better 'than others, some more verbose than others, some more thoughtfully developed than others – are routinely considered in appraisal actions. I fail to see a material difference, for purposes of admissibility, between an opinion that is expressed by the company's auditor (presumably who otherwise qualifies as a expert) a few weeks after the merger and an auditor giving an opinion at trial as an expert.'

In sum, I overrule Petitioner's objections to Respondent's Exhibits 57-59 and I find that the factual findings of the Oklahoma court are generally entitled to collateral estoppel effect. I do not now resolve whether any particular factual

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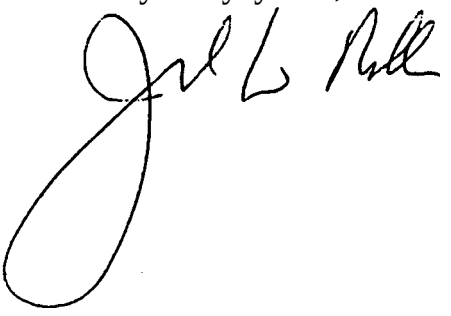
[8] Petitioner has not objected to the audit letters because of a lack of opportunity to cross examine the author of the letters or any of the other "standard" objections that could perhaps have been raised. Furthermore, Petitioner, through his expert witness, had full opportunity to develop an analysis of the financial reports and the effect, if any, on valuation of CTCA.

finding is entitled to collateral estoppel effect.[9] Furthermore, the weight, if any, to be given to this evidence and the inferences, if any," to be drawn from this evidence are still fair game for post-trial argument.

IT IS SO ORDERED.

Very truly yours,



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[9] Thus, for present purposes, I leave it to the parties to argue, as they see fit, what those findings were and whether they are otherwise appropriately considered here.
[10] For example, see Letter of Arthur L. Dent, Esquire, dated May 2, 2002, at 2-3.