EFiled: Dec 8 2006 1:56PM EST
Transaction ID 13141093

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 S. STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

December 8, 2006

Michael A. Weidinger, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899-2306

William O. LaMotte, III, Esquire
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

Re: Oliver, et al. v. Boston University, et al.
C.A. No. 16570-NC
Date Submitted: August 8, 2006

Dear Counsel:

The BU Defendants have moved, under Court of Chancery Rule 59(f), for reargument of the Court's post-trial memorandum opinion which awarded actual and nominal damages from them to the plaintiff class of minority common stockholders of Seragen.[1] Specifically, the BU Defendants contend that: (1) the Court erred when it concluded that, with regard to the Marathon facility, BU was

[1] *Oliver v. Boston Univ.*, 2006 WL 1064169 (Del. Ch. Apr. 14, 2006). The factual background, of course, is set forth in greater detail there, and the terms defined there are used in this letter opinion for convenience.

only entitled to receive $5 million (plus ten percent interest) of the merger proceeds instead of $8 million; and (2) BU should be allowed an offset of $1.5 million—the amount received by the plaintiff class from the Settling Defendants.

"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] Furthermore, "[n]ew arguments that have not previously been raised cannot be considered for reargument."[3] Because the Court fully considered the arguments advanced by the BU Defendants concerning Marathon's operating losses which BU subsidized, the BU Defendants' motion for reargument as to that contention is denied. In addition, the BU Defendants' request for an offset may not be addressed by way of a motion for reargument because the issue was not timely raised.

1. Payment for the Marathon Facility

In an effort to reduce its cash needs and operating losses, Seragen, a struggling biotechnology company,[4] sold its manufacturing facility (the "Marathon

[2] *Ramunno v. Capano*, 2006 WL 510064, at *1 (Del. Ch. Feb. 23, 2006) (citing *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000)).
[3] *Lane v. Cancer Treatment Ctrs. of Am., Inc.*, 2000 WL 364208, at *1 (Del. Ch. Mar. 16, 2000).
[4] For a more detailed description of the company, and the financial predicament that prompted the Marathon sale, *see Oliver*, 2006 WL 1064169, at *2-11.

facility") to BU (or, more accurately, to Marathon, an entity wholly owned by BU) for $5 million on February 19, 1997.[5] The terms of the sale obligated BU to provide Seragen with research, development, clinical trial, and manufacturing services at the Marathon facility for two years in accordance with the Service Agreement.[6] Additionally, Seragen retained the right to re-purchase the Marathon facility from BU for the original sale price ($5 million), plus any unreimbursed expenses incurred by BU under the Service Agreement, plus interest at ten percent.[7] Although it was anticipated that BU would subsidize the facility's operating expenses, BU hoped (and, to an extent, expected) to be reimbursed eventually.

Approximately a year after it had sold the Marathon facility to BU, Seragen entered into the Merger Agreement with Ligand under which Ligand would acquire Seragen for aggregate consideration of approximately $75 million.[8] Initially, $70 million of the merger proceeds was allocated to the purchase of Seragen, and $5 million was to be paid to BU for the Marathon facility.[9]

---

[5] Joint Exhibit ("JX") 183.
[6] JX 211 at 27.
[7] JX 211 at App. B, 10-11.
[8] JX 232; JX 262 at App. C (Agreement and Plan of Reorganization ("Merger Agreement")).
[9] JX 232; JX 262 at App. C.

Later on, it was decided that BU would receive $8 million, instead of $5 million, for the Marathon facility.[10] This reduced the proceeds available for Seragen to $67 million and, correspondingly, reduced the merger proceeds allocated to Seragen's common stockholders.

In its post-trial memorandum opinion, the Court concluded that the BU Defendants breached the duty of loyalty during the allocation process. The apportionment of merger proceeds to BU for its Marathon interests was no exception. BU stood on both sides of the transaction; thus, it bore the burden of demonstrating the entire fairness (fair dealing and fair price) of the allocation.

The Court, however, concluded that the BU Defendants failed to demonstrate fair dealing— indeed, as the memorandum opinion explains in greater detail, the allocation process was carried out with almost flippant disregard for the interests of the minority shareholders.[11] The BU Defendants also failed to prove

[10] *Compare* JX 232 at BU00662 with JX 262 at D-12 (Option and Asset Purchase Agmt. at § 3.4).

[11] For example, an independent committee was not formed, nor were independent legal or financial advisors retained to assess the fairness of the allocation of the proceeds. Silber, BU's president, explained that he did not perceive the need to utilize any of these safeguards, as "there is no separation of interest between Boston University and the [minority] stockholders of Seragen." Tr. at 305. *See also* Tr. at 294 (Silber) ("I don't think there was any conflict of interest because the interest of Boston University and the interest of the stockholders of Seragen was one and the same. There was an identity of interests there, and consequently there wasn't any potentiality of the conflict of interest."). Without a dedicated representative, the common

fair price, a conclusion that the BU Defendants now challenge in their motion for reargument. Specifically, the BU Defendants contend that:

> [T]he Court's calculus regarding the spread between the actual consideration received by BU for the Marathon Facility and the 'fair consideration' failed to include or account for the actual operating expenses incurred by BU, thereby misapprehending the facts relative to the price that Seragen would have had to pay to reacquire the manufacturing facility from BU or its designee.[12]

Contrary to BU Defendants' assertions, the Court did not overlook Marathon's operating expenses paid by BU. "Motions for reargument are not a mechanism for litigants to relitigate claims already considered by the court."[13]

In their motion for reargument, the BU Defendants rely upon the testimony of Condon, Prior, and Penny and Joint Trial Exhibit 267-A for the proposition that "BU incurred substantial costs operating the Marathon manufacturing facility, and that Seragen did not (and could not) repay those costs."[14] The Court considered this evidence.[15] Indeed, the Court accepts that BU suffered substantial losses in connection with the Marathon facility and that some of those losses were not

---

shareholders' interests were seemingly drowned-out by the efforts of conflicted fiduciaries to enhance the position of BU and its affiliates.

[12] Mot. for Reargument at 2.

[13] *Am. Legacy Found. v. Lorillard Tobacco Co.*, 895 A.2d 874, 877 n.15 (Del. Ch. 2005) (quoting *In Re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1).

[14] Mot. for Reargument at 3.

[15] *See Oliver*, 2006 WL 1064169, at *40-43.

reimbursed. The Court, however, rejects BU's contention that it was entitled to a reallocation of $3 million above the $5 million initial price for the Marathon facility—as compensation for those losses—in light of the Accord and Satisfaction Agreement.

Under the terms of the Accord Agreement, BU received $5,902,192 from the merger proceeds as compensation for the service fees that Seragen owed to BU for use of the facility.[16] Although this amount did not fully repay BU for the losses it incurred,[17] according to the Accord Agreement, BU agreed to accept the $5,902,192 of the merger consideration "*as full and complete satisfaction of Seragen's obligation to pay to it any and all Technology Service Fees, Additional Service Fees, royalties, or any other amounts whatsoever that are payable under the terms of the Service Agreement*."[18] Because BU agreed that $5,902,192 of the

[16] JX 262 at App. C-11 (Merger Agreement § 1.7 (C)(2) & (3)); JX 262 at App. F-13. (Accord Agmt. § 1.5). The amount ($5,902,192) is the sum of such payments to BU and Marathon. Seragen owed BU $6,401,766 in service fees when the Merger Agreement was executed. JX 262 at App. F-9. BU did not incur—as far as one can tell from the record—substantial operating losses between execution of the Merger Agreement and closing.

[17] The exact amount owed to BU under the Service Agreement is unclear. BU claims that operation of the Marathon facility cost it at least $15,926,615 in losses. Mot. for Reargument at 4.

[18] JX 262 at App. F-13 (Accord Agmt. § 1.5) (emphasis added). The Accord Agreement thus released BU's claims for service fees (along with "*any other amounts whatsoever* that are payable under the terms of the Service Agreement")—the costs of operating the Marathon facility that BU had absorbed—through the closing date.

merger proceeds would *completely* satisfy its (and Marathon's) claims against Seragen for operating expenses, the BU Defendants cannot rely on those operating expenses to justify the fairness, either as a matter of process or as a matter of price, of the $3 million reallocation of merger proceeds that it received for its interest in the Marathon facility.

A few additional words on this topic may be appropriate. The award now challenged by the BU Defendants was premised in part upon the Court's determination that such sum reflected the diversion of merger proceeds away from the minority stockholders without any semblance of a fair process to protect or represent the minority's interests. I have undertaken a thorough review of the record, have reread the briefs and transcripts of oral argument, and have carefully reconsidered the reasons why I reached the conclusion which I did. Notwithstanding that effort, I remain unpersuaded that I misapprehended the facts or failed to apply appropriate legal principles.

I also am not unmindful of a theme underlying the BU Defendants' position: in the colloquial, that "no good deed goes unpunished." But for the support of the BU Defendants, Seragen, it could plausibly (and, most likely, accurately) be argued, would have failed well before a merger with Ligand (or any other entity)

could have been accomplished. That event, of course, would have deprived the Seragen minority stockholders of any recoupment of their investment.

The difficulty with the "no good deed goes unpunished" perception and with the BU Defendants' motion for reargument is that the Court necessarily must focus, for these purposes, on the process by which the merger proceeds were allocated. No formula or preexisting models exist for ascertaining, in this context, an after-the-fact "fair" allocation. The actual allocation was, in fact, established as a result of negotiation among certain constituencies within the Seragen community, negotiation no doubt made necessary by the structure of Ligand's offer (*i.e.*, leaving it to Seragen to allocate the merger pot among the many seeking to partake). The shortcoming of the negotiation process was simple: no one negotiated on behalf of the minority common stockholders; everyone involved in the negotiation effort was conflicted (*i.e.*, interested or beholden to someone who was interested). Thus, the Seragen fiduciaries failed to put in place any process to protect to any extent the interests of the minority common stockholders. With that, there was a fundamental failure of fair process, as a result of the breach of fiduciary duty, in the allocation process, and that had an impact on the merger consideration reaching the minority common stockholders. Although the trial

record may not be as precise as one would like, the award to the plaintiff class members represents a reasonable approximation of what was "negotiated away" because of the absence of "entire fairness." The BU Defendants may chafe at this model for damage calculation; they are, however, the ones who controlled the process by which the merger proceeds were, in fact, allocated.

Therefore, the motion for reargument challenging the award of damages based on the allocation of Merger proceeds with respect to the Marathon facility is denied.

2. Offset

The Settling Defendants, shortly before trial, agreed to pay the plaintiff class $1.5 million in accordance with a settlement agreement which was not finalized or approved by the Court until several months after trial. The BU Defendants, by way of their motion for reargument, seek to offset the Settling Defendants' payment against their liability.

The question of setoff is a new argument—it was not raised at trial or even before the Court's memorandum opinion was issued. That the Settling Defendants and the Plaintiffs had agreed to settle was, of course, known before trial. The reach of a motion for reargument is limited. It "may not be grounded on a new

issue or contention that could have been raised at trial."[19] That, however, is what the BU Defendants now attempt to do. According, this aspect of their motion for reargument must also be denied.[20]

3. Conclusion

For the foregoing reasons, the BU Defendants' motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Michael J. Maimone, Esquire
Register in Chancery-NC

[19] *Magid v. Acceptance Ins. Co.*, 2001 WL 1641238, at *1 (Del. Ch. Dec. 10, 2001).
[20] The Court expresses no view on whether setoff would otherwise have been appropriate. The position advanced by the BU Defendants raises interesting questions, ranging from whether the Uniform Joint Tortfeasors Act, with its procedural requirements, applies, *see* 10 *Del. C.* § 6302; *In re Telecorp*, 2003 WL 22901025 (Del. Ch. Nov. 19, 2003), to whether equitable principles or the collateral source rule should be considered. *See, e.g.*, *Mitchell v. Haldar*, 883 A.2d 32 (Del. 2005).