IN THE SUPREME COURT OF MISSISSIPPI

CLARK SALES & RENTAL, INC., ET AL., DEFENDANTS-APPELLANTS

V. No. 2006-CA-01577

JAMES BRAXTON, ET AL. PLAINTIFFS-APPELLEES

CONSOLIDATED WITH

AEARO, ET AL. DEFENDANTS-APPELLANTS

V. No. 2006-CA-01582

JAMES E. MCDUFF, ET AL. PLAINTIFFS-APPELLEES

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On Appeal from the Circuit Courts of Issaquena and Sharkey Counties, Mississippi
Cause No. – 02-0016
Cause No. – 02-101

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# REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ORAL ARGUMENT REQUESTED

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## INTRODUCTION

After first trying to sidestep this Court's review altogether by arguing that Defendants' appeal is untimely – a meritless proposition because Defendants timely filed their notice of appeal twenty-seven days after entry of the trial court's final order of dismissal – O'Quinn's basic assertion is that it is shielded from liability because the screening process it established provided an objectively reasonable basis for it to believe that the thousands of unfounded claims it filed had "some hope of success." In so asserting, O'Quinn would have this Court ignore all of the evidence (and the findings of the MDL Court) that these were not, in fact, ordinary screenings, with independent doctors, examining a large population, and providing *bona fide* diagnoses of potential claimants that they truly believed, and diagnosed, to have a disease. Instead, it was a process that was gimmicked by O'Quinn to generate a large number of claims from a small population as quickly as possible.

The record demonstrates that O'Quinn, without any scientific reason to believe there was any epidemic of silicosis afoot in Mississippi, built, micromanaged, and even *participated in* a diagnosing process that found incredible numbers of purported positive diagnoses in a small population. Not one of O'Quinn's plaintiffs was previously or subsequently diagnosed with silicosis by their own treating physician. O'Quinn selected the individuals to be screened, recorded their exposure histories, and then sent them to a screening company that received payment only when the hired doctor rendered an acceptable positive diagnosis of silicosis. The implausibility of these diagnoses is further highlighted by the fact that over half of these supposed silicosis victims also supposedly suffered from asbestos-related disease: O'Quinn purposely set up a process by which doctors were either (i) unaware that individuals had previously been diagnosed with asbestosis because O'Quinn, who took the plaintiffs' histories, purposely deprived the doctors of this information, or (ii) complicit (in a most un-doctorly, un-

diagnostic way) in O'Quinn's deception by following O'Quinn's explicit instructions to generate separate, mutually-exclusive silicosis and asbestosis reports that would be difficult for Defendants and courts to detect.

O'Quinn did this while being fully aware, because of its involvement with asbestos litigation, about the grave burden that mass filings impose on defendants and the courts. It well knew the leverage to be gained by mass filings. Moreover, it did all this without *any* scientific evidence or indication that there was in Mississippi or elsewhere (at the present or at any time in history) the kind of massive epidemic of silicosis that O'Quinn claimed to have happened upon by chance. To this date, there is *no* scientific support for any of this. Each and every claim has been dropped. The notion that the lawyers who generated these cases bear no responsibility for their actions would reduce the ethical obligations of Mississippi attorneys to a nullity.

Even a cursory review of the MDL Court's findings demonstrates that O'Quinn's conduct was "without substantial justification, . . . was interposed for delay or harassment, . . . [and] unnecessarily expanded the proceedings." Miss. Code Ann. § 11-55-5(1). O'Quinn deems these findings to be mere "supposition" – apparently on the sole grounds that Judge Jack ultimately determined that she lacked federal subject matter jurisdiction. (*See* James Braxton, et al. and James McDuff, et al. Appellees' Reply Brief ("Opp.") at 2.) But O'Quinn's emphasis on the federal court's lack of subject matter jurisdiction fundamentally misstates the issues before this Court. Judge Jack's findings are binding upon O'Quinn because Defendants' motion for sanctions relied, in the first instance, on principles of collateral estoppel, law of the case, and judicial estoppel to bind O'Quinn to the MDL Court's findings. O'Quinn was assuredly subject to the MDL Court's jurisdiction for the sanctions that court awarded, and all of that court's findings were made in a setting that gives rise to a binding effect in this Court.

However, even if the trial court had properly declined to accept the MDL Court's findings, Defendants alternatively asked for (i) the opportunity to put evidence before the lower court in a hearing similar to that which took place before the MDL Court, and/or (ii) the opportunity to discover and put forth additional evidence of O'Quinn's misconduct. (BR 33-36; MR 87-90.) The trial court erred in refusing Defendants to do so. This refusal could only have been correct if O'Quinn had demonstrated that its conduct was so evidently beyond reproach that there was simply no point in considering sanctions, notwithstanding the 2,040 utterly meritless claims and the MDL Court's findings about how those meritless claims came to be filed.

## ARGUMENT

Section I first addresses the timeliness of this appeal, followed by a brief discussion of the applicable standard of review in Section II. Section III then addresses the question whether the trial court erred in simply declining to accept the findings of the MDL Court. Finally, Section IV addresses whether O'Quinn's conduct was so obviously appropriate as to justify the trial court's summary rejection of Defendants' request for an evidentiary hearing and further discovery on the issues.

### I. DEFENDANTS PROPERLY FILED THEIR NOTICE OF APPEAL WITHIN THIRTY DAYS FROM ENTRY OF FINAL JUDGMENT

O'Quinn makes a half-hearted attempt to avoid appellate review altogether by claiming that Defendants' appeal is untimely. This argument is meritless. The trial court entered its Order dismissing this matter on August 17, 2006. (*See* BR 1973; MR 1342). Defendants filed their Notice of Appeal on September 13, 2006, within the thirty-day period prescribed by the Mississippi Rules of Appellate Procedure. (*See* BR 1975-78; MR 1361-63). O'Quinn's suggestion that the time for appeal was triggered on June 28, 2006 – the date the trial court

entered its Order denying Defendants' Motion for Sanctions – is unsupported by any authority, contrary to settled law, and ignores the fact that such an order is neither a final judgment nor subject to interlocutory review.

This Court has jurisdiction to hear appeals from *final* judgments entered in both circuit and chancery court. *See* Miss. Code Ann. § 11-51-3; *see also* Miss. R. Civ. P. 54 (defining a judgment as "a final decree and any order from which an appeal lies."). A judgment is final for appeal "*only* when it settles all issues as to all parties." *Cotton v. Veterans Cab. Co., Inc.*, 344 So. 2d 730, 731 (Miss. 1977) (emphasis added); *see also Banks v. City Finance Co.*, 825 So. 2d 642, 647-48 (Miss. 2002) (treating appeal from order compelling arbitration as interlocutory and therefore, not subject to Supreme Court review where "the order of the trial court simply compelled arbitration, but did not dismiss the claims or end the litigation on the merits . . . .").

Here, on August 17, 2006, the trial court ordered that "the claims of all of the Plaintiffs are dismissed without prejudice against each and every Defendant," thereby ending the litigation and triggering the thirty-day period within which to appeal. (*See* BR 1973; MR 1342). Thus, until that date, there simply existed no final judgment from which Defendants could appeal.

Nor could Defendants have sought interlocutory review of the order denying their motion for sanctions. An order denying a motion for sanctions is *not* subject to interlocutory appeal and may *only* be appealed following entry of a final judgment. *See, e.g., Empresas Omajede, Inc. v. A.J. Bennazar-Zequiera*, 213 F.3d 6, 9 (1st Cir. 2000) (holding bankruptcy court's order denying motion for Rule 11 sanctions was not subject to interlocutory appeal; neither district court nor court of appeals had jurisdiction to consider the sanctions issue until final judgments were entered in underlying bankruptcy case); *accord McCright v. Santoki*, 976 F.2d 568, 570 (9th Cir. 1992); *Haskell v. Washington Township*, 891 F.2d 132, 133 (6th Cir. 1989) (cited in 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1337.4 (3d ed. 2007) ("[A] denial of

sanctions is appealable only after the entry of a final judgment on the merits in the action and is not subject to interlocutory review")).

The trial court's order denying the motion for sanctions was not a final order nor could it have been reviewed on an interlocutory basis. Defendants' only avenue of appealing the denial of their request for sanctions was to await entry of a final judgment, which occurred on August 17, 2006. Defendants filed their notice of within thirty days from that date and therefore, this appeal is properly before the Court.

## II. REVIEW BY THIS COURT IS *DE NOVO* BECAUSE, AMONG OTHER THINGS, THE LOWER COURT ERRONEOUSLY CONCLUDED THAT IT WAS NOT BOUND BY THE MDL COURT'S FINDINGS

As discussed in Defendants' Opening Brief, the lower court misperceived the correct legal standards in reaching its decision and thus its decision is reviewed with heightened scrutiny. *See, e.g., Leaf River Forest Prods., Inc. v. Deakle*, 661 So. 2d 188, 196 (Miss. 1996) ("Where the trial court misperceived the correct legal standard, the error becomes one of law, therefore the deference usually afforded the trial court's decisions is not warranted."). The lower court erroneously concluded that it was not bound by the MDL Court's findings.

Thus, the lower court committed a "clear error in judgment" by (i) failing to sanction O'Quinn for filing lawsuits that were "without substantial justification," "frivolous," "groundless in fact or in law," (ii) concluding that it could not issue sanctions where Plaintiffs' claims were voluntarily but belatedly dismissed; (iii) concluding that it could not sanction O'Quinn because certain Texas authorities had not done so;[1] (iv) disregarding the MDL Court's findings regarding

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[1] O'Quinn makes no attempt to rebut Defendants' argument that the lower court committed clear error by abdicating its responsibility to police ethical conduct in the Mississippi court system to others by finding that sanctions against O'Quinn were unwarranted because – as it erroneously

(continued...)

O'Quinn's sanctionable conduct; and (v) wholly ignoring Defendants' request for additional discovery. (*See* Appellants' Record Excerpts ("ARE") Tab B; BR 1971-72; MR 1340-41.) All are errors of law. To the extent the Court did address any of these issues under the correct legal standard, it made clearly erroneous findings and abused its discretion in how it resolved them.

## III. BECAUSE THE MDL COURT'S FACTUAL FINDINGS ARE BINDING UPON O'QUINN AS A MATTER OF LAW, DEFENDANTS NEED NOT REPEAT THE EVIDENTIARY HEARINGS

As Defendants demonstrated in their Opening Brief, the MDL Court's findings were, in fact, binding here on O'Quinn because (1) O'Quinn is collaterally estopped from attacking those findings because the findings were made on a full evidentiary record from which O'Quinn had the opportunity but chose not to appeal, (2) the findings also were made in the context of the federal court determining its own jurisdiction; (3) they were made in the very same cases that have now been returned to state court; and (4) as a matter of judicial estoppel, they are binding because in persuading Judge Jack to retain the case and rule upon pre-trial matters, Plaintiffs' counsel assured the district court that if the case was ultimately remanded to state court, the federal court's rulings and findings would be binding in the state court.

### A. The MDL Court Made Extensive Findings And Actually Sanctioned O'Quinn, Who Had The Opportunity But Chose Not To Appeal Those Findings, And Thus, They Are Binding Upon O'Quinn Here

O'Quinn admits that Judge Jack actually sanctioned O'Quinn for the *Alexander* case. (Opp. at 19.) O'Quinn does not contest the fact it fully participated in the MDL Court proceedings that led to the sanctions, nor that Judge Jack had jurisdiction to levy the sanctions

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concluded – there had "been no charge, indictments, convictions, or sanctions by the appropriate Texas authorities, or the Texas Bar for fraud as a result of collusion by [O'Quinn] and the named physician, Dr. Harron." (*See* Opening Br. at 36-38.)

against it in *Alexander*. Notwithstanding these concessions, however, O'Quinn argues that it would somehow unfair to apply *res judicata*/collateral estoppel principles to the MDL Court's findings.[2]

O'Quinn is wrong. All of the MDL Court's findings about O'Quinn, including its finding of frivolous filings and rigged screenings, were made in support of sanctions against O'Quinn – a matter over which the MDL Court concededly had (even under O'Quinn's theory) jurisdiction. The MDL Court made broad fact-findings in support of sanctions but simply limited its sanctions award to reflect that it only had jurisdiction over the *Alexander* case, filed in that court. *See In re Silica Prods. Liab. Litig., No. 1553*, 398 F. Supp. 2d 563, 676, n.180 (S.D. Tex. 2005) (hereinafter, "*In re Silica MDL*"). The MDL Court's findings, made in support of the liability determination, embraced the entirety of O'Quinn's conduct with respect to all of the O'Quinn cases:

> [I]t should have been apparent to O'Quinn in late-2003, as it was preparing to file a case with 100 Plaintiffs, all Mississippi or Alabama residents, that it was medically implausible for the Plaintiffs' silicosis diagnoses to have been accurate . . . . When considering the fact that O'Quinn not only filed the 100-Plaintiff *Alexander* case, but also was in the process of filing silicosis cases for over 1,900 other Plaintiffs (almost all of whom were Mississippi or Alabama residents), then the implausibility should have been even more starkly apparent. . . . At this point, medical implausibility had become a virtual impossibility.

*Id.* at 674.[3] Those findings are directly relevant to the issues presented here.

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[2] The doctrine of *res judicata* requires the presence of four identities: "(1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made." *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 665 (Miss. 1998); *Dunaway v. W.H. Hopper & Associates, Inc.*, 422 So. 2d 749, 751 (Miss. 1982).

[3] Likewise, the MDL Court found it relevant to its decision to sanction O'Quinn that over half of O'Quinn's 2,000 clients had previously been diagnosed with asbestosis. *See In re Silica MDL*,

(continued...)

O'Quinn argues that "the MDL court did not find that O'Quinn had filed this suit frivolously." (Opp. at 2.) On the contrary, the MDL Court found *exactly* that: "Plaintiffs' counsel such as O'Quinn filed scores of claims without a reliable basis for believing that their clients had a compensable injury, thereby 'multipl[ying] the proceedings . . . unreasonably and vexatiously." *In re Silica MDL*, 398 F. Supp. 2d at 677 (citation omitted). Judge Jack made findings with respect to the conduct of *all* plaintiffs' counsel and in connection with all of the cases pending in the MDL. *See In re Silica MDL*, 398 F. Supp. 2d at 676, n.180 ("The conduct that forms the basis of O'Quinn's § 1927 liability is not confined to *Alexander* or to O'Quinn"). She ultimately determined, however, that she did not have subject matter jurisdiction over any firm but O'Quinn, and even then for only one case. She, therefore, actually issued sanctions with the case filed in her court by O'Quinn, and focused many of her findings on O'Quinn. Furthermore, under a "strict construction" of 28 U.S.C. § 1927, Judge Jack was constrained to limit the finding of liability, and the amount of the sanctions to events in her court. But she specifically noted that "[a]bsent strict construction, the Court likely would find that liability arose with the filing of the Complaint." *Id.*, at 676, n.181.

O'Quinn also argues that Mississippi state courts have "no jurisdiction to sanction alleged conduct that occurred in another court." (Opp. at 1.) But O'Quinn's fraud, while uncovered by the federal court, was found in cases originally filed here in the Mississippi state courts and later returned here. That *some* of O'Quinn's actions in "'multipl[ying] the proceedings . . . unreasonably and vexatiously" took place in federal court does not alter the fact that

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398 F. Supp. 2d at 674, n. 178 ("All told, over half of O'Quinn's 2,000 MDL Plaintiffs previously filed asbestosis claims").

O'Quinn "unnecessarily expanded the proceedings by other improper conduct." *Jackson County Sch. Bd. v. Osborn*, 605 So. 2d 731, 735 (Miss. 1992). This Court can obviously issue sanctions based on the frivolous filing in the courts of this State – which gave rise to all of the costs and expenses of this case. Moreover, where the cases began here, and have been returned here, the courts of this State can consider the conduct in these cases that took place while on detour to the federal court. This is particularly clear where the federal court has declined to consider sanctions for conduct occurring before it in deference to allowing the Mississippi courts (where the cases began and were returned) to exercise jurisdiction over these cases. Indeed, the notion that O'Quinn could escape sanctions because a *portion* of its misconduct occurred while the case was in federal court turns justice on its head.

Finally, O'Quinn argues that "giving preclusive effect to the MDL court's order would improperly deny O'Quinn any opportunity to appeal the findings in that order." (Opp. at 2.) But O'Quinn had ample opportunity to appeal Judge Jack's findings within the federal system, but instead made a calculated decision to not challenge them. Judge Jack unequivocally determined that O'Quinn engaged in sanctionable conduct by multiplying the proceedings and pursuing claims with reckless disregard for the absence of any reliable basis on which to conclude that plaintiffs actually suffered from silicosis. She went on to impose monetary sanctions on O'Quinn pursuant to 28 U.S.C. § 1927, which permitted the court to order plaintiffs' counsel "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

No barrier existed that would have precluded O'Quinn from pursuing an appeal of Judge Jack's sanction order to the Fifth Circuit Court of Appeals. O'Quinn chose not to challenge Judge Jack's findings on appeal, and ultimately paid the entire amount of the sanctions. It

cannot now claim that its choice to forego an appeal somehow hinders this Court's ability to apply *res judicata* principles.

### B. The MDL Court Made Its Findings As Part Of Its Jurisdictional Analysis And Those Findings Are Therefore Entitled To Preclusive Effect Under The Doctrines Of *Res Judicata* And Collateral Estoppel

Even if the findings were not made in connection with the award of sanctions against O'Quinn itself, O'Quinn would be bound in any event by virtue of the fact that the findings were made by a court seeking to determine its own jurisdiction. In asserting that "the MDL court had no jurisdiction over this case, so its order and findings are void and have preclusive effect" (Opp. at 2), O'Quinn wholly ignores this fact. *See* Opening Br. at 39-41. It is, perhaps, unsurprising that O'Quinn chooses to ignore this established exception to the general rule that orders and findings issued by a court with no jurisdiction are void in light of the MDL Court's own statements that "the Court conducted these hearings prior to deciding the issue of subject-matter jurisdiction . . . because they were potentially relevant to the issue of the Court's subject-matter jurisdiction" (*In re Silica MDL*, 398 F. Supp. 2d at 597-98) and "it bears repeating that the Court conducted these hearings prior to deciding the issue of subject-matter jurisdiction . . . [because] the hearings were potentially relevant to the issue of the Court's subject-matter jurisdiction" (*id.* at 587). A federal court's statement that its findings were advanced in connection with its jurisdictional analysis is itself binding.

The findings were part of the jurisdictional inquiry here because the *bona fides* of the claims was part of the jurisdictional determination. Plaintiffs had tendered thousands of claims against hundreds of defendants *en masse*, some of which were alleged to be so meritless that they could be ignored for diversity jurisdiction purposes. The fundamental defects in the tendered claims emerged in the course of the limited discovery that the MDL Court had been requested

to allow. It is well-settled that a court's findings made in connection with a jurisdictional determination are entitled to preclusive effect. *See, e.g., Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 446 U.S. 694, 702 n.9 (1982); *United States v. United Mine Workers of Amer.*, 330 U.S. 258, 292 n.57 (1947); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). O'Quinn *cites no authority* to the contrary. *Neither* of the cases cited by O'Quinn on void orders involved orders or findings rendered in connection with jurisdictional analyses. *See Donald v. Reeves Tranp. Co.* 538 So. 2d 1191 (Miss. 1989); *In re Guardianship of Z.J.*, 804 So. 2d 1009 (Miss. 2002).

### C. The MDL Court's Findings Are Binding Under The Law Of The Case Doctrine Because It Rendered Its Findings In These Same Cases Before Remand

O'Quinn ignores the fact that Judge Jack's findings were rendered in this very case, albeit before remand back to the Mississippi courts. The rulings of a state court, before removal to federal court, are given presumptive effect in the federal court, after removal. Similarly, the rulings of the federal court remain presumptively effective in state court after remand back to the state court. (*See* ARE Tab C; BR 311-12; MR 352-53 (MDL Court's rulings "would be applicable to the cases, even if they are ultimately remanded to state court . . . [precisely because these cases] even after remand back to state court, are still the same cases, with the same parties and the same pre-trial rulings controlling them") (internal citations omitted).) Those findings may not be perpetually binding; after all, a later judge that takes over a case from a prior judge, may, for good cause, overrule the prior judge's determinations. But at a minimum, the rulings are presumptively honored in subsequent proceedings in the same case. *See El Chico Rests., Inc. v. Transp. Ins. Co.*, 509 S.E.2d 681, 683 (Ga. Ct. App. 1998) (orders of federal court remain valid in cases remanded back to state court). The trial judge here did *not* explain why he believed those rulings and findings could simply be ignored. Neither does O'Quinn.

### D. The MDL Court's Findings Are Binding As A Matter of Judicial Estoppel

Even if Judge Jack's findings were not binding upon O'Quinn as a matter of collateral estoppel and law of the case, they are binding upon O'Quinn here because of O'Quinn's assurances to the MDL Court ***that plaintiffs would be bound by its findings even if the case were returned to the state court for lack of federal jurisdiction.*** O'Quinn argues that in order for it to be bound the statements it made to the MDL Court "the argument that was forwarded and then retracted from [must be] the basis of the court's decision." (Opp. at 20.) But the issue is reliance, not "basis." The fact remains that the case would not have been before the federal court if O'Quinn and cohorts had not assured the MDL Court that its rulings would continue to control if the cases went back to the state court. (If both sides had agreed that the remand issue had to be decided immediately, it is difficult to imagine how the court would have retained the case to consider the issues and enter the rulings it did.)

Judicial estoppel is an equitable principle designed to preclude parties from benefiting from a position taken in one court and then flip-flopping when before another court. As the this Court has explained:

> Judicial estoppel precludes a party from asserting a position, benefitting [sic] from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation. . . . Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation.

*Richardson v. Cornes*, 903 So. 2d 51, 56 (Miss. 2005) (quoting *Dockins v. Allred*, 849 So. 2d 151, 155 (Miss. 2003)).

Here, O'Quinn asserted the position that discovery should go forth in the MDL Court notwithstanding Defendants' request that the MDL Court should proceed to resolve the question of jurisdiction *before* allowing wholesale discovery to begin. Plaintiffs urged the MDL

Court to keep the case long enough to accomplish the purposes of the MDL. (*See* ARE Tab C; BR 309-11; MR 350-52.) Plaintiffs assured the MDL Court that if she allowed discovery to proceed, and issued orders *ad interim*, it would not be for naught, even if the court subsequently determined that it lacked jurisdiction and had to remand: All such findings would be binding on the parties in the state courts. (*See* ARE Tab C; BR 311-12; MR 352-53.)

Judge Jack sided with Plaintiffs and postponed consideration of the jurisdictional issue for over a year while she presided over disclosures and extensive discovery. Having participated in that discovery, Defendants used what they had found in connection with later arguments regarding subject matter jurisdiction. But this does not alter the fact that such discovery would not have taken place, *but for* Plaintiffs' assurances that the proceedings in the MDL Court would not be for naught and that all rulings and findings would be binding upon the parties after remand. Although O'Quinn might now argue that it did not "benefit" from its position based upon the outcome of the courts' hearings, it does not alter the fact that O'Quinn took the position so that it could conduct wholesale discovery on the Defendants and it benefited by being able to undertake that discovery.

Notwithstanding that a jurisdictional issue had been raised and Defendants sought to have it resolved, O'Quinn "successfully, unequivocally, and repeatedly" assured Judge Jack that she had the authority to continue to effectuate the MDL discovery process, rule upon a range of matters before addressing jurisdiction, and that even if the cases were remanded, all parties would be bound by those rulings. (*See* ARE Tab C; BR 311-12; MR 352-53.) In doing so, O'Quinn cannot now argue to this Court that Judge Jack's findings have no effect here simply because they do not like how the findings turned out.

O'Quinn also responds to the application of judicial estoppel by repeating the entirely inapposite rejoinder that federal subject matter jurisdiction cannot be created by estoppel. (*See*

Opp. at 20 ("the argument fails due to the parties [sic] inability to confer subject matter jurisdiction on the court") and cases cited therein.) That is all well and good, but it is irrelevant. No one is suggesting that O'Quinn's statements to the MDL Court vested it with subject matter jurisdiction. Judicial estoppel applies against a party for equitable reasons. It serves to ensure that party is not inequitably permitted to take inconsistent positions. It does not depend on whether the court *to whom* the statement is made had jurisdiction. Rather, the focus is on the inappropriate conduct of the party attempting to take inconsistent positions. Here, the courts of Mississippi do have jurisdiction and thus possess the power to ensure that O'Quinn remains bound by its own prior statements to the federal court.

The assurances that O'Quinn, quite correctly, gave to the MDL Court, in order to persuade that court to retain jurisdiction and allow discovery to proceed, was that its findings would be binding in the state courts *even if* the MDL court ultimately remanded the cases back to those courts for lack of jurisdiction. It is in no position to repudiate those assurances now.

## IV. BASED ON THE MDL COURT'S OPINION, THE LOWER COURT – AT A MINIMUM – SHOULD HAVE ORDERED FURTHER DISCOVERY AND ALLOWED A FULL EVIDENTIARY HEARING

The MDL Court's findings concerning O'Quinn's conduct are binding and warrant imposition of sanctions; the lower court erred in declining to accept those findings.

However, even if the lower court could properly reject those findings, they nonetheless describe a *prima facie* basis for inquiry. At a minimum, the lower court should have allowed Defendants to put on the underlying evidence and assess the evidence for itself. The lower court refused to do so. O'Quinn suggests that this refusal was fully justified because its conduct was obviously beyond reproach because (i) in filing these cases, it "had some hope of success," (ii) it followed utilized mass screenings, (iii) it is not expected to have epidemiological expertise,

and (iv) neither Defendants nor Judge Jack have proven that any particular plaintiff does not have silicosis. None of these arguments carries the day.

### A. O'Quinn's "Hope Of Success" Here Could Only Have Been Based On The Notion That It Could Pressure Settlements; There Was No Basis Upon Which To Believe Any Of These 2,000 Claims Was Meritorious

O'Quinn suggests that it bears no responsibility for the way it generated these claims because it was fooled – by the very screening process *it* had designed – into believing the claims might have merit. But as demonstrated in our opening brief, this process was incapable of generating *bona fide* claims. As the MDL Court observed, by filing claims *en masse*, O'Quinn might well have believed that it could force settlements upon the Defendants. But that is not the type of "hope of success" that the Accountability Act requires. *See* Miss. Code Ann. § 11-55-5(1). The Accountability Act contemplates that the claims brought to court will have colorable factual and legal merit.

O'Quinn cites cases holding that an attorney need not be sure he or she will win; if suit is filed with a "hope of success," it is acceptable. Of course, even O'Quinn would agree that it is not enough that one individual (of the 2,000) have silicosis and thus an arguable hope of success. To avoid sanctions, ***each*** claimant must show that he or she had some hope of success against ***all*** defendants. *See Deakle*, 661 So. 2d at 197 (sanctions warranted because suit was filed frivolously as to some defendants, even though it had a hope of success as to others).

The cases cited by O'Quinn are easily distinguished on their basic facts. For example, *Bean v. Broussard*, 587 So. 2d 908, 913 (Miss. 1991) relied upon by O'Quinn, was based on the principle that because Miss. R. Civ. P. 11 does not impose an independent duty of inquiry upon an attorney signing pleadings, one attorney's failure to independently verify statements about the

merits of a case that he had been told about by another attorney was not grounds for imposing Rule 11 sanctions. Thus, a lawyer can ordinarily accept a plausible story told to him.[4]

In *Bean*, a plaintiff in a wrongful death suit misrepresented to her Louisiana attorney that she had informed the defendants, an emergency room doctor and nurse, of her child's penicillin allergy. Bean, who was licensed in Mississippi, was subsequently associated following a telephone conversation during which Louisiana counsel told him that he had "informally conferred with a physician" who examined the hospital records and determined the defendants were negligent. At the time of filing suit, Bean also possessed documentation supporting the contention, namely the child's immunization record evidencing her penicillin allergy and the child's death certificate. *Id.* at 912. Plaintiff's misrepresentation was revealed during her deposition and defendants successfully moved for summary judgment. *Id.* at 910-11. The trial court then granted the defense motion for imposition of Rule 11 sanctions. *Id.* at 911. Bean appealed to this Court which reversed, finding that Bean's belief, at the time of filing, that the case had merit was not unreasonable. The Court explained, "[t]his much is certain, at the time the complaint was filed, Bean knew that the child had been seen by Dr. Broussard, discharged and within four hours of discharge, the infant died. There was no adequate explanation for

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[4] O'Quinn hypothesizes that the "distinction" between Federal Rule of Civil Procedure 11, which "requires a reasonable and continuing inquiry" from the plaintiff's attorney, and the Mississippi Rule of Civil Procedure 11, which "does not," further supports the trial court's decision not to rely on Judge Jack's findings. (Opp. at 18-19.) This argument is wholly unavailing. Contrary to O'Quinn's reading of the MDL Court's opinion that "Judge Jack, using the Federal Rule 11 and its progeny, determined that sanctions were appropriate" (*id.*) against O'Quinn in *Alexander*, Judge Jack imposed sanctions pursuant to 28 U.S.C. § 1927, which is comparable in its requirements to the Mississippi Litigation Accountability Act. *Compare* 28 U.S.C. § 1927 (applying to "unreasonable" or "vexatious" conduct) *with* Miss. Code Ann. § 11-55-5, *et seq.* (applying to conduct that is found to be "frivolous, groundless in fact or in law, or vexatious").

death in the record. Under these circumstance, the possibility of negligence is strong." *Id.* at 913 n.5.

Unlike in *Bean*, this is simply not a case of reasonable reliance upon a reasonable story. Here, O'Quinn itself generated the "story" from top to bottom, without any scientific support anywhere – whether from a medical journal, a news report, a doctor who examined a patient in the ordinary course, or another lawyer that presumably investigated the facts. O'Quinn sought out and found claimants. It designed the process and paid for silicosis diagnoses. Moreover, in *Bean*, the Court found that: "At the time of filing, [the attorney] believed that the case had merit based on the information that he had. Objectively viewed, that belief was not unreasonable." *Id.* At the time of filing here, there was no objective support for the proposition that one might simply stumble upon over 2,000 plaintiffs with silicosis. And the process that O'Quinn set up did not conform to medical standards, but rather met only O'Quinn's needs. Lastly, there is no basis to suggest each plaintiff could have had a claim against each of the 73 defendants each sued.

O'Quinn also cites this Court's holdings in *Scruggs v. Saterfield*, 693 So. 2d 924, 927 (Miss. 1997), *Stevens v. Lake*, 615 So. 2d 1177, 1185 (Miss. 1993), and *Smith v. Malouf*, 597 So. 2d 1299, 1304 (Miss. 1992), noting that the "chance of success" standard was met there. In those cases, this Court held that a case bears some chance of success if (i) a plaintiff is bringing a matter of first impression before the court (*Scruggs*); (ii) makes a good faith argument for tolling a statute of limitations that otherwise has run (*Stevens*); or (iii) presents an argument for reversal of precedent (*Malouf*). A party should always be allowed to bring a case based upon a plausible argument for a change or extension of the law. But this case involves no such argument. This case involves a mass tort filing of thousands of cases that had no medical support for them and for which no reasonable assessment of medical merit was made. O'Quinn may well have

believed that simply by putting up such a universe of claimants it could "succeed" in obtaining settlements. But that is not the type of success the law contemplates.

### B. O'Quinn Designed A Screening Process That Not Only *Did Not* Comport With Accepted Medical Practice But Was Designed Specifically Not To

O'Quinn asserts that although "mass screening procedures may not be perfect . . . [t]he procedures used here are established mechanisms and used in the mass tort context for years. . . ." (Opp. at 7-8.) But as discussed throughout this briefing, this is not a case where Defendants are asking this Court to "decide how plaintiffs in mass tort cases may be most reliably diagnosed" as O'Quinn suggests. (*Id.* at 7.) For the vast majority of these plaintiffs, O'Quinn devised a system where ***those plaintiffs were not diagnosed at all.*** *See In re Silica MDL*, 398 F. Supp. 2d. at 581. Although medical screenings may serve a purpose, as recognized by the MDL Court where there is "rigorous medical oversight" (*id.* at 599), this Court is not being asked to weigh in on the validity of those screenings.

Both the MDL Court's opinion and Defendants' Opening Brief detail just how far O'Quinn's screening process strayed from being "accepted medical practice" and thus we do not repeat that discussion here. Suffice it to say, the MDL Court struck the "diagnoses" of O'Quinn's screening doctors on the grounds that they did not comport with medically-accepted standards. Indeed, the MDL Court found "it is apparent that truth and justice had very little to do with these diagnoses – otherwise more effort would have been devoted to ensuring they were accurate. Instead, these diagnoses were driven by neither health nor justice: ***they were manufactured for money.***" *See In re Silica MDL*, 398 F. Supp. 2d at 635 (emphasis added).

Beyond the fact that Judge Jack struck all of the silicosis diagnose for failing to comport with medical standards, O'Quinn fails to offer any explanation for how its "nationally accepted method [of mass screening]" (Opp. at 25) managed to produce simultaneous diagnoses of

silicosis and asbestosis – two diseases which medicine and science say is virtually impossible for one individual to contract. As discussed at length in Defendants' Opening Brief, several experts testified before the MDL Court that the number of silica claimants in the federal MDL who also had an asbestos-related claim was "stunning and not scientifically plausible." *In re Silica MDL*, 398 F. Supp. 2d at 629 (quoting Dr. John Parker, former administrator of NIOSH's B-reader program). The MDL Court found that

> many pulmonologists, pathologists and B-readers go their entire careers without encountering a single patient with both silicosis and asbestosis. . . . Stated differently, a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis. N&M parked a van in some parking lots and found over 4,000 such cases.

*Id.* at 603.

O'Quinn asserts that Defendants "fail to introduce a single iota of evidence to support this claim." (Opp. at 25.) On the contrary, Defendants introduced the MDL Court's opinion which documented this phenomenon in detail. Moreover, Defendants offered further *prima facie* evidence – in the form of O'Quinn's own Congressional testimony among other things – to support its request for additional discovery into O'Quinn's abuses of the legal system.

This combined evidence demonstrates that O'Quinn's screening process was designed to be medically *unacceptable* from the start; *i.e.* it would never produce valid silicosis diagnoses. Specifically, O'Quinn built a system designed to produce *only* silicosis reports in the first instance. To that end, O'Quinn, who took the individuals' work histories instead of a doctor, left standing instructions for the screening company to ensure that a silicosis diagnosis contained no reference to asbestos or other disease. In the event that a history taken by O'Quinn implicated both silica and asbestos exposure, O'Quinn charged the screening company and hired doctor to issue two separate and mutually exclusive reports, and send the silicosis report to

O'Quinn and the asbestosis report to an affiliated firm – the Foster Law Firm (f/k/a Foster & Harssema). *See In re Silica MDL*, 398 F. Supp. 2d at 603, n.66.

### C. O'Quinn Cannot Claim That It Is Entitled To Rely On The Medical "Experts" That They Supplanted

O'Quinn professes that it is guilty only of not "challeng[ing] the opinions of their experts." (Opp. at 18.) It further assets that "Mississippi law does not require lawyers to become doctors or statistical experts when determining whether an individual has a potential claim." (*Id.* at 25.) But in making this argument, O'Quinn attempts to have its cake and eat it too. O'Quinn does not contest that it played a substantial role in the diagnosing process. Indeed, O'Quinn trumpets its extensive involvement as a sign of how reasonable its actions were prior to the filing of these cases. Among other things, O'Quinn "established" the screening criteria and required N&M and the screening doctors to strictly comport with its criteria in making their diagnoses. (Opp. at 11-13.) Moreover, O'Quinn actively participated in the diagnostic process by, among other things, "provid[ing] the inadequate occupational and exposure histories underlying the purported diagnoses." *In re Silica MDL*, 398 F. Supp. 2d at 675-76.

Notwithstanding that it designed and participated in the diagnosing process, O'Quinn claims that, as a group of lawyers, it cannot be held to the same standards as doctors. But even lawyers would know (1) that when one pays only for an affirmative finding of silicosis, that is likely to provide incentives to generate such findings; (2) that persons who had recently had their x-rays examined by a doctor who failed to notice (and bring to the patient's attention) any finding of silicosis, may not (in fact) have silicosis; (3) that they were finding extraordinary numbers of silicosis cases in a small population; and (4) that there were absolutely no reports of any silicosis epidemic or concentration in Mississippi (or elsewhere).

O'Quinn cannot suggest, on the one hand, that it acted reasonably in setting criteria that "reflected accepted medical practice" but then claim, on the other, that it was epidemiologically naïve and did not understand that the results of the diagnostic process it established were beyond the pale of medical plausibility. Moreover, O'Quinn separated the asbestosis diagnoses and silicosis diagnoses that it was simultaneously procuring for many of these claimants precisely because the dual diagnoses were facially implausible. If O'Quinn was astute enough to educate itself to design a process for silicosis diagnosis and take over a role in that process typically filled by the medical profession, then it must be also charged with the requisite medical knowledge of how rare silicosis is – and how much rarer it is to find an individual with both silicosis and asbestos-related disease. As Judge Jack determined when she sanctioned O'Quinn for the very same conduct:

> Once O'Quinn donned a lab coat and injected itself into the diagnostic process, it is reasonable to charge them with knowledge both of what is required for a medically-acceptable diagnosis, and of how far their diagnoses strayed from that standard.

*Id.*

O'Quinn could not have failed to know what it was doing – unless it had its head purposely submerged deeply in the sand. Either way, O'Quinn's efforts do not comply with the ethical standards expected of members of the legal profession.

### D. O'Quinn Bore The Burden Of Establishing The Diagnoses

O'Quinn's defense that Defendants cannot identify which of these plaintiffs does not have these diseases is no defense at all. Contrary to O'Quinn's repeated assertions that

Defendants have never shown that any of the 2,000+ plaintiffs actually do not have silicosis,[5] in Mississippi, the burden for ensuring that all of the claims were filed with some prospect of success lay squarely on O'Quinn. *See id.*; *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 494 (Miss. 2004) ("Absent exigent circumstances, plaintiffs' counsel should not file a complaint until sufficient information is obtained, and plaintiffs' counsel believes in good faith that *each plaintiff* has an appropriate cause of action to assert against a defendant in the jurisdiction where the complaint is to be filed" (emphasis in original)). Mississippi law prohibits "simply dragging a defendant into court to defend a claim, prior to acquiring having [sic] knowledge, information, or belief that there is a good ground to support that claim." *See Eatman v. City of Moss Point*, 809 So. 2d 591, 595 (Miss. 2000).

Thus, it is not Defendants' burden to disprove that any one individual had silicosis, and certainly not a burden Defendants could meet without discovery. It is the converse fact that has significance: There is simply no basis upon which O'Quinn could assert that *any* of these plaintiffs did, in fact, have silicosis. None (or virtually none) of the claims was the product of a patient that went to his or her treating physician complaining of some symptom or for

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[5] O'Quinn asserts that "neither Defendants nor Judge Jack identified a single Plaintiff in this action that does not suffer from silicosis, nor did Defendants or Judge Jack identify a single plaintiff whom O'Quinn had no reasonable basis to believe to be suffering from silicosis when it filed this suit." (Opp. at 9.) (*See also* Opp. at 10 ("Judge Jack did not identify a single Plaintiff whose occupation exposure is incorrect, incomplete, or fails to satisfy the level of exposure or latency necessary to support a diagnosis of silicosis. The exposure history and latency elements are thus satisfied, and O'Quinn did not file a "frivolous lawsuit by relying on those histories").) O'Quinn says this despite the fact that Judge Jack found the entire screening process employed by O'Quinn was not just "inadequate," but designed to manufacture silicosis diagnoses for dollars. *See In re Silica MDL*, 398 F. Supp. 2d at 635.

evaluation.[6] None of them had a *bona fide* diagnosis from any doctor, even as part of a screening. And the general process used by O'Quinn for generating these claims was incapable of producing any credible diagnoses. To the contrary, the sheer number of claims – and the number of dual diagnoses – belies the credibility of the process. Perhaps more to the point, O'Quinn has summarily dropped each and every claim: That is presumably not something O'Quinn would have done if any of them had actually involved – even by mere coincidence – an actual case of silicosis.

It is O'Quinn's obligation to have proper diagnoses of silicosis in hand before it files suit. It is not up to the Defendants or the MDL Court to sift through thousands of manufactured diagnoses to determine whether any of the plaintiffs happens to actually suffer from silicosis.

## CONCLUSION

For the reasons set forth above and in its Opening Brief, Defendants respectfully request that this Court reverse the lower court and direct it to order an award of sanctions against O'Quinn, or in the alternative, to remand this matter back to the lower court and direct it to permit further discovery and fact-finding.

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[6] The MDL statistics revealed only 12 diagnosing doctors and approximately 8,000 treating physicians. The categories had no overlap. As noted by the MDL Court:

> In total, the more than 9,000 Plaintiffs who submitted Fact Sheets listed the names of approximately 8,000 different doctors. And yet, when it came to isolating the doctors who diagnosed Plaintiffs with silicosis, the same handful of names kept repeating. All told, the over 9,000 Plaintiffs who submitted Fact Sheets were diagnosed with silicosis by only 12 doctors. In virtually every case, these doctors were not the Plaintiffs' treating physicians, did not work in the same city or even state as the Plaintiffs, and did not otherwise have any obvious connection to the Plaintiffs. Rather than being connected to the Plaintiffs, these doctors instead were affiliated with a handful of law firms and mobile x-ray screening companies.

*In re Silica MDL*, 398 F. Supp. 2d at 580; *see also id.* at 620 ("nine physicians issued 99 percent of the diagnoses submitted in this MDL")

Respectfully submitted,

Clark Sales & Rentals, Inc.; Clark Sand Co., Inc.; Clemco Industries Corporation; Custom Aggregates & Grinding, Inc.; Eastern Safety Equipment Co., Inc.; Parmelee Industries, Inc.; P.K. Lindsay Company; and Precision Packaging, Inc. f/k/a Quikrete Materials, Inc.

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## CERTIFICATE OF SERVICE

I, Fred Krutz, one of the counsel for Defendants-Appellants in this appeal, hereby certify that I have this day caused to be mailed, U. S. Mail, first class postage prepaid, a copy of the foregoing Reply Brief of Defendants-Appellants to the following interested parties:

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This the 24th day of September, 2007.

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