For Dockets See 14-12-00320-CV

Court of Appeals of Texas, Houston (14th Dist.).
Sam **KAZMAN**, Appellant,
v.
FRONTIER OIL CORPORATION, et al., Appellees.
No. 14-12-00320.
July 31, 2012.

On Appeal from the 113th Judicial District Court of Harris County, Texas Cause No. 2011-11451 the Honorable John Donovan, Presiding
Oral Argument Requested

Brief of Appellant Sam Kazman

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REQUEST FOR ORAL ARGUMENT

Appellant Sam Kazman requests the opportunity to present oral argument in support of this brief.[FN1]

FN1. *See* TEX. R. App. P. 39.1, 39.7.

IDENTITY OF PARTIES AND COUNSEL

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STATEMENT OF THE CASE

A. Nature of the Case

This suit is a class action related to a proposed (now consummated) merger between two corporations. In particular, the class action alleged claims of (i) breach of fiduciary duty against certain individuals, and (ii) aiding and abetting such breaches against two corporations, and (though not explicitly) sought injunctive relief. See Plaintiff's First Amended Class Action Petition, Clerk's Record ("C.R.") vol. 1, p. 59, at 79, 82-85.

B. Course of Proceedings: Trial Court and Judge

The underlying lawsuit was filed on February 22, 2011 and assigned to the 113th District Court for Harris County, Texas (the "Trial Court"). On March 25, 2012, the Trial Court consolidated several related cases into the instant case. *See* Order Consolidating Related Actions, C.R. vol. 1, p. 46.

On October 7, 2011, the Trial Court granted preliminary approval to the parties' proposed Stipulation and Agreement of Settlement Between Defendants and Class Plaintiffs (the "Stipulation and Settlement"). *See* Preliminary Approval Order, C.R. vol. 1, p. 149.

Over several objections and without conducting an evidentiary hearing or entering findings and conclusions, on January 6, 2012 the Trial Court entered an Order approving the Stipulation and Settlement. *See* Order and Final Judgment, C.R. vol 4, p. 676. This appeal follows.

ISSUES PRESENTED

The following five issues are submitted on appeal for this Court's consideration:

1. The Stipulation and Settlement provides only non-cash relief (in the form of disclosures) to the class, while providing $612,500.00 in attorneys' fees to class counsel. Because the Stipulation and Settlement approved by the Trial Court provided cash recovery to the attorneys and not to the class, the Stipulation and Settlement violated the "Coupon Rule" as described section 26.003(b) of the Texas Civil Practices and Remedies Code and Texas Rule Civil Procedure 42(i)(2), which requires that attorney fees awarded in a class action be awarded in cash and noncash amounts in the same proportion as the recovery for the class.

The Trial Court erred concluding that the Stipulation and Settlement did not violate the "Coupon Rule" of Texas Rule Civil Procedure 42(i)(2).

2. In exchange for marginal disclosures and a fee award to counsel, the Defendants received full releases for the claim brought in the class action. This relief is insufficient for the consideration provided, particularly where, as here, the class receives little if any benefit.

The Trial Court erred in finding that the Stipulation and Settlement was fair, reasonable, and adequate.

3. Class members received the Notice of Class Action Settlement such that they had less than two weeks to review and consider the Stipulation and Settlement, and if necessary, either prepare, file and serve an Objection or engage counsel to do the same.

The Trial Court erred in approving the Stipulation and Settlement because Notice of the Proposed Settlement was insufficient.

4. Plaintiff, as the class representative, is charged with fairly and adequately protecting the interests of the class. Instead, Plaintiff protected the interests of his attorneys at the expense of and to the detriment of the class.

The Trial Court erred in finding that the class representatives fairly and adequately protected the interests of the class.

5. The Trial Court failed to hold a hearing or enter and findings or conclusions regarding the award of attorneys' fees, and their reasonableness and necessity, as required by Rule Texas Rule of Civil Procedure 42(h).

The Trial Court erred in awarding attorneys' fees to class counsel without holding a hearing, considering, or entering findings and conclusions as to their reasonableness and necessity.

STATEMENT OF FACTS

1. On or about February 22, 2011, Frontier Oil Corporation (“Frontier”) and Holly Corporation (“Holly”) announced that on February 21, 2011, Frontier, Holly, and a North Acquisition, Inc., Holly subsidiary (“North”), had entered into an Agreement and Plan of Merger (the “Merger”). *See* Stipulation and Agreement, C.R. vol. 1, p. 88.

2. Under the terms of the Merger, Frontier shareholders were entitled to receive (i) 0.4811 shares of Holly common stock in exchange for each share of Frontier common stock they owned immediately prior to the effective date of the Merger, and (ii) a special dividend of $0.28 per share for holders as of a certain record date. *See* Stipulation and Settlement, C.R. vol. 1, p. 88, at 89.

3. Immediately, several individuals filed what they hoped would be certified as class action challenges to the Merger in the District Courts of Harris County, Texas. *See, e.g.*, Plaintiff's Original Class Action Petition, C.R. vol. 1, p. 2; Stipulation and Settlement, C.R. vol. 1, p. 88, at 89-90.

4. On or about March 25, 2011, the cases were consolidated into the instant case. *See* Order Consolidating Related Actions, C.R. vol. 1, p. 46.

5. On April 12, 2011, the Trial Court appointed the law firms Edison, McDowell & Hetherington, LLP and Robbins Geller Rudman & Dowd, LLP as interim class counsel. See Order Granting Adam Walker's Motion for Appointment of Interim Class Counsel, C.R. vol. 1, p. 52.

6. After approximately two months, counsel for the named Plaintiff and Defendants engaged in negotiations that resulted in a Memorandum of Understanding (the “MOU“) which would itself form the basis of a proposed class action settlement (the “Proposed Settlement”). *See* Stipulation and Settlement, C.R. vol. 1, p. 88, at 91-92.

7. Pursuant to the MOU, in exchange for global releases for all Defendants, Frontier and Holly would supplement their May 2011 proxy statements by making supplemental disclosures regarding the Merger in Form 8-Ks. *See* Stipulation and Settlement, C.R. vol. 1, p. 88, at 92-96.

8. The only relief afforded to class members in exchange for the global releases took the form of just over 1,300 words in a supplemental disclosure. See Stipulation and Settlement, Exhibit “A“ (the “8-K“), C.R. vol. 1,p. 88, at 113-118.

9. Neither the MOU nor the Proposed Settlement have any effect on the amount of consideration exchanged for shares in the Merger. *See* 8-K, C.R. vol., p. 88, at 113 (“The settlement will not affect the amount of merger consideration to be paid in the merger.”).

10. The settling parties presented no evidence that the additional disclosures would make any material differ-

ence to a reasonable investor.

11. At a special meeting of shareholders held just eight days later on June 28, 2011, even with the additional disclosures negotiated by class counsel, the Frontier shareholders voted to approve the merger by a 99% vote. See Objection to Proposed Settlement of Unnamed Class Member Sam Kazman (the "Objection"), Exhibit "A," C.R. vol. 1, p. 160, at 175-177.

12. On October 7, 2011, the Trial Court granted preliminary approval to the Stipulation and Settlement. See Preliminary Approval Order, C.R. vol. 1, p. 149.

13. Pursuant to the Trial Court's Order, the parties sent a Notice of Pendency and Settlement of Class Action and Hearing on Proposed Settlement (the "Notice") such that it was received during the first full week of December 2011. See Objection, C.R. vol. 1, p. 160, at 171; *see also* Affidavit of Andrew G. Beckord of BMC Group, Inc. Re: (A) Mailing of the Notice; and (B) Report on Exclusion Received, C.R. vol. 2, p. 318, at 319-320 ("The notification phase began on November 4, 2011 and continued through December 13, 2011 as additional investors and potential Nominee Purchasers were identified.").

14. The Notice advised that hearing on the Stipulation and Settlement was set for January 6, 2012 at 9:00 a.m. *See* Objection, C.R. vol. 1, p. 160, at 163; cf Stipulation and Settlement, Exhibit "C," Notice of Pendency and Settlement of Class Action and Hearing on Proposed Settlement, C.R. vol. 1, p. 88, at 128, and Preliminary Approval Order, C.R. vol. 1, p. 149, at 153.

15. The Notice further advised that any objection must be filed and served into the hands of several counsel in Texas and in California no later than 20 days before the settlement hearing, or Saturday, December 17, 2011 (*i.e.*, less than two weeks after the notice was received). *See* Objection, C.R. vol. 1, p. 160, at 163; *see also* Stipulation and Settlement, Exhibit "C," Notice of Pendency and Settlement of Class Action and Hearing on Proposed Settlement, C.R. vol. 1, p. 88, at 135-36.

16. On December 14, 2011, Kazman timely filed (i) a Notice of Appearance, (ii) Objection to the Proposed Class Action Settlement, and (iii) Affidavit in Support of the Objection. *See* Notice of Appearance, C.R. vol 1, p. 158; Objection, C.R. vol 1, p. 160; Affidavit of Unnamed Class Member Sam Kazman in Support of his Opposition to Proposed Settlement (the "Kazman Affidavit"), first Supplemental Clerk's Record ("S.C.R.") vol. 1, pp. 1-3.

17. The Objection and Affidavit met the requirements of the Notice, to wit: Appellant is a member of the class action lawsuit having held shares of Frontier during the relevant time period (February 18, 2011 through and including July 1, 2011). *See* Objection, C.R. vol 1, p. 160; Kazman Affidavit, S.C.R. vol. 1, pp. 1-3.

18. On December 29, 2011, the Defendants in the Trial Court filed a response to the objection to the Stipulation and Settlement filed by another unnamed class member (not Appellant). *See* Defendants Response in Opposition to Walter E. Ryan, Jr.'s Objection to Proposed Stipulation and Agreement of Settlement Between Defendants and Class Plaintiff ("Defendants' Response"), C.R. vol 2, p. 179.

19. On or about December 30, 2011, the named Plaintiff moved the Trial Court to approve the Stipulation and Settlement over the objections of Appellant and other unnamed class members. *See* Plaintiff's Motion for Final Approval of Class Action Settlement under Texas Rule of Civil Procedure 42 and Memorandum of Points and Authorities in Support Thereof (the "Motion to Approve"), C.R. vol 3, p. 376. The Motion to Approve was supported by several exhibits and affidavits.

20. On January 3, 2012, Appellant Kazman filed his Reply in Support of Objection. See Reply in Support of Objection, and Responses to Defendants' Response in Opposition to Walter E. Ryan Jr.'s Objection to Proposed Stipulation and Agreement of Settlement Between Defendants and Class Plaintiffs, and Plaintiffs' Motion for Final Approval of Class Action Settlement under Texas Rule of Civil Procedure 42 and Memorandum of Points and Authorities in Support Thereof, C.R. vol 4, p. 635.

21. On January 6, 2012, at the hearing on the Motion to Approve, the Trial Court did not make a record, but announced it was overruling all objections to the Stipulation and Settlement, and approved the Stipulation and Settlement by entering its Order and Final Judgment. *See* Order and Final Judgment, C.R. vol 4, p. 676.

22. On January 13, 2012, Appellant Kazman filed his Motion for New Trial and Request for Findings of Fact and Conclusions of Law. *See* C.R. vol. 4, p. 686, vol 4, p. 693.

23. Also on January 13, 2012, Appellant Kazman submitted to the Trial Court an Order overruling his objection to the Stipulation and Settlement. See proposed Order Overruling Objection of Sam Kazman to Proposed Settlement of Class Action, C.R. vol 4, p. 689, 691. The Trial Court did not enter the Order.

24. On February 8, 2012, Appellant Kazman filed his Motion to Entry of Orders, *see* C.R. vol 4, p. 697, seeking to have the Trial Court enter an Order overruling the Objection. The Trial Court did not enter an Order.

25. On February 15, 2012, Appellant Kazman filed his Notice of Past Due Findings of Fact and Conclusions of Law. See C.R. vol 4, p. 711. The Trial Court did not enter any Findings of Fact and Conclusions of Law.

26. On February 27, 2012, Appellant Kazman's Motion for Entry of Orders was heard by the Trial Court by submission. See Notice of Hearing Held by Submission. C.R. vol 4, p. 705. The Trial Court did not enter an Order.

27. On March 26, 2012, Appellant Kazman objected to the Trial Court's refusal to enter an Order overruling the Objection. *See* Objection to Refusal to Enter Ruling C.R. vol 4, p. 733. The Trial Court did not enter an Order.

28. Appellant Kazman timely filed his Notice of Appeal on April 2, 2012. *See* Notice of Appeal, C.R. vol 4, p. 744.

SUMMARY OF THE ARGUMENT

This is an appeal of an order approving a settlement of a strike suit.

When Plaintiffs' attorneys, purporting to represent shareholders, bring meritless litigation threatening to hold up a merger or conduct expensive discovery, and the Defendants essentially agree to pay the attorneys to go away, parties are able to rationalize the settlement with trivial additional disclosures that make no difference. But it is shareholders - the putative clients of the plaintiffs' attorneys - who bear the costs of such a settlement.

A class action settlement designed to benefit only the attorneys can be neither fair nor reasonable; class representatives and plaintiffs' attorneys who engage in such self-dealing cannot possibly be considered to be “fairly and adequately protecting] the interests of the class” under Texas Rule of Civil Procedure 42(a)(4). Indeed, if the protections of Texas Rule of Civil Procedure 42(e)(1) are to mean anything, zero-dollar settlements that make class members worse off than if no litigation had been brought at all should not be countenanced by Texas courts.

This is not just a matter of sound public policy. It is affirmatively required by existing Texas and federal class action law that the Trial Court failed to apply.

The Trial Court below erred in entering the Order and Final Judgment which approved and incorporated the Stipulation and Settlement for at least five reasons. First, the terms of the Stipulation and Settlement directly violate the provisions of Texas Rule of Civil Procedure 42(i) which requires that attorneys' fees awarded in a class action be awarded in cash and noncash amounts in the same proportion as the recovery for the class. Second, the terms of the Stipulation and Settlement were not fair, reasonable, and adequate as required by Rule 42(e). Third, the Trial Court erred in approving the Settlement and Stipulation because the Notice of the Proposed Settlement was insufficient. Fourth, the Trial Court erred in approving the settlement where the class representatives did not fairly or adequately protect the interests of the class. Finally, the Trial Court erred in awarding attorneys' fees to class counsel without hold-

ing a hearing and entering findings and conclusions as to their reasonableness and necessity as required by Rules 42(h) and (i).

It was reversible error to approve the settlement and certify the class. At a minimum, the wealth-transfer from shareholders to plaintiffs' attorneys who did nothing for the shareholders must be rejected.

7ARGUMENT

A. Issue 1: The Trial Court erred in concluding that the Stipulation and Settlement did not violate the "Coupon Rule" of Texas Rule Civil Procedure 42(i)(2).

Recognizing the Texas Supreme Court's wariness of and public dissatisfaction with the use of class-action settlements to provide large cash awards for class counsel but picayune recovery for the class,[FN2] the Texas Legislature directed that the Texas Rules of Civil Procedure were to provide for the fair and efficient resolution of class actions.[FN3] In calling for the amendment of Rule 42, the legislature recognized - and sought to curb - the potential for abuse by attorneys who would use the mechanism of a class action in order to extract a settlement as the "cost of doing business."[FN4]

FN2. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 961 (Tex. 1996) ("[T]he terms of the nonmonetary settlement in this case raise additional concerns about the conflicting interests of class counsel and class members, because the value of the settlement can only be roughly estimated. Although the trial court found that the attorney's fees awarded here represent less than ten percent of the approximate value of the settlement, under a lodestar approach the fees awarded amount to a rate of approximately $1,500.00 per hour."); Michael Northrup, *Restrictions On Class-Action Attorney-Fee Awards*, 46 S. TEX. L. REV. 953, 961 (2005) ("The adoption of the coupon rule evidences the legislature's dissatisfaction with the practice of leveraging the class-action device into settlements that provide insignificant recoveries (or effectively no recovery) to class members, while the class attorneys recover large cash awards.").

FN3. *See* TEX. CIV. PRAC. & REM. CODE § 26.001 ("The supreme court shall adopt rules to provide for the fair and efficient resolution of class actions."); TEX. CIV. PRAC. & REM. CODE § 26.002 ("Rules adopted under Section 26.001 must comply with the mandatory guidelines established by this chapter.").

FN4. *See* CAPITOL RESEARCH SERVICES, THE LEGISLATIVE HISTORY OF TEX. H.B. 4: THE MEDICAL MALPRAC & TORT REFORM ACT OF 2003, Vol. 1, p. 483, C.R. vol. 1, p. 651 ("*What is [sic] happened in class action lawsuits is that oftentimes claims are bought for the purpose of extracting an early settlement in which the attorneys are paid.*") (emphasis added). Class actions challenging mergers are particularly vulnerable to abuse. See Ann Woolner, et al., When Merger Suits Enrich Only Lawyers, BLOOMBERG, February 16, 2012, available at http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html ("Of 57 such investor class actions settled or otherwise concluded [in Delaware] in 2010 and 2011, 40 - or 70 percent - made money for plaintiffs' lawyers but not clients, according to data compiled by Bloomberg News."); David Nicklaus, Class-action lawyers swarm around buyout deals, ST. LOUIS POST-DISPATCH, February 7, 2012, available at http://www.stltoday.com/business/columns/david-nicklaus/class-action-law-

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html ("'Not all shareholder litigation is fraudulent or nonmeritorious, but merger litigation is pretty weak,' [Columbia University law professor John] Coffee said. The weak cases, he said, result in settlements where the company agrees to amend its disclosure documents, without paying any more money to shareholders. 'If you got no value, and just settle for additional disclosure, you are giving in to a kind of polite extortion, Coffee asserts.") (emphasis added); Ashley Post, Delaware Judges Shrink Fees to Plaintiffs Lawyers, INSIDE COUNSEL, July 19, 2011, available at http://www.insidecounsel.com/2011/07/19/delaware-judges-shrink-fees-to-plaintiffs-lawyers ("As these challenges to corporate transactions continue to flood the Delaware courts, judges have become increasingly critical of plaintiffs firms that file meritless or weak lawsuits on behalf of shareholders."); Tom Hals and Jonathan Stempel, Analysis: Merger Lawsuits Increase - as do the Legal Fees, REUTERS, Feb. 11, 2011, available at http://www.reuters.com/article/2011/02/11/us-shareholder-lawsuits-idUSTRE71A4HI20110211 ("The real problem, I think, is in cases where lawyers win a few extra sentences of disclosure and walk away with $ million of fees ... Judges should consider whether these provisions actually create value for shareholders ... or amount to a rearranging of the deck chairs to create the illusion of value to justify attorneys' fees."); Shark Attack, THE ECONOMIST, Jun. 2, 2012; cf Felzen v. Andreas, 134 F.3d 873, 876 (7th Cir. 1998) (citing extensive academic literature, and concluding that "[m]any thoughtful students of the subject conclude, with empirical support, that derivative actions do little to promote sound management and often hurt the firm by diverting the managers' time from running the business while diverting the firm's resources to the plaintiffs' lawyers without providing a corresponding benefit"); N. Scott Fletcher (counsel, herein, for Appellees Holly Corporation and North Acquisition, Inc.), et al., Distrubing Trends in M&A Litigation, 59 TEXAS STATE BAR LITIG. SEC. REPORT (THE ADVOCATE) 31, 31 (Summer 2012) ("One obvious reason for the increase in merger cases is that these types of lawsuits are particularly attractive to plaintiffs' attorneys."). Remarkably, the percentage of M&A transactions worth over $500 million that result in shareholder lawsuits has risen from 39% to 96% since 2005. See Cornerstone Research, Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions (2012), available at http://www.cornerstone.com/files/News/d7e418ea-eb2c-4a17-8eae-de2510d9d1ba/Presentation/NewsAttachment/8b664075-ebfb-4cce-aa76-8a050befad03/Cornerstone_Research_Shareholder_MandA_Litigation.pdf.

***8** Included in the legislation was a requirement that attorneys' fees, if any, be awarded in the same cash to non-cash ratio as the recovery obtained for the class. [FN5]

FN5. See TEX. CIV. PRAC. & REM. CODE § 26.003(b) ("Rules adopted under this chapter must provide that in a class action, if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney's fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.").

Texas Rule of Civil Procedure 42(i) adopts the Legislature's mandate verbatim, requiring that:

***9** If any portion of the benefits recovered for the class are in the form of coupons or other noncash common

benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.[FN6]

FN6. TEX. R. CIV. P. 42(i)(2).

In the instant case, the only putative benefit to the class is the noncash common benefit of additional marginal disclosures;[FN7] there is no cash common benefit to the class.[FN8] By the simple application of the plain meaning of the Rule, because there is 0% cash recovery for the class, there can be no cash compensation for the class counsel.[FN9]

FN7. *See* Stipulation and Settlement, C.R. vol. 1, p. 88, 91.

FN8. See Stipulation and Settlement, C.R. vol. 1, p. 88, 91.

FN9. *See also* Michael Northrup, Restrictions On Class-Action Attorney-Fee Awards, 46 S. TEX. L. REV. 953, 962 (2005) ("Moreover, if a class suing for declaratory relief on an insurance contract is awarded declaratory relief, Rule 42(i)(2) requires that the attorney-fee award must also be in the form of declaratory relief... Therefore, it appears that an attorney's sole source of payment in a class-action suit seeking only nonmonetary relief is his or her fee agreement with the class representatives."); Jeremy Counseller, *Texas Procedural Developments:* 2003 Year in Review, 56 BAYLOR L. REV. 343, 356 (2004) ("For example, if, as in Bloyed, the entire settlement is composed of noncash benefits, then the plain terms of Rule 42(i) require that the entire attorney fee award also take the form of noncash benefits.").

At the Trial Court, class counsel self-interestedly argued that this is an absurd result, and that it could not have been the intention of the Legislature;[FN10] however, this precise concern was raised more than once during the Legislature's deliberations which would result in section 26 of the Civil Practices and Remedies Code.[FN11] Nevertheless, the ***10** statute passed without alteration of that issue, meaning that it was the intended result fo the legislation.[FN12]

FN10. *See* Motion to Approve, C.R. vol. 3, p. 376, at 421-424.

FN11. *See* CAPITOL RESEARCH SERVICES, THE LEGISLATIVE HISTORY OF TEX. H.B. 4: THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, Vol. 1, p. 539, C.R. vol. 4, p. 654 ("[Rep. Joseph M. Nixon] What this is simply saying is look, we're not going to allow that anymore. *If you don't have a class fund, if there isn't something to give class members, you know, the lawyers are going to have to take their fee out of that, and if its [sic] not there, then there's not going to be a fee."*) (emphasis added); *id.* Vol. 1, pp. 538, 539-40, C.R. vol. 4, pp. 653, 654-55 ("[Rep. Craig Eiland] What if there is no money for the common benefit of the people? Then they get zero, because you would compare the amount of the common fund which is zero, or the [lode star] of the hourly rate, which, let's say is $200,000. Well, the attorneys will get zero under this bill because of the lesser of zero and $200,000 of hourly rate is zero. And that's crazy. And so I don't know how you can vote against not fixing this. What my bill says is - or my amendment says on page 7, line 3, and this is where is talking about computing the base rate. It says, 'If the court awards a fee - if a court awards a fee in a class action to the attorney or attorneys for the class, the fee must be awarded... You can't have just an equitable class action lawsuit with no money exchanging hands. And that the judge can award 25% of the common benefit to the class to the attorneys and keep in mind, it says, 'the lesser of the common fund or 25% of the common fund or an hourly rate.' Fine, don't mess with that, *but with [sic] there is no a common fund? Then the attorneys gets zero. And I think that's probably the intent of this bill,* but that's not the right thing to do. So I move that you vote 'No' on

the motion to table because this is goofy.") (emphasis added); *id.*, Vol. 3, 1800-01, C.R. vol. 4, pp. 674-75 ("[Steve McConnico, Texans for Civil Justice] We think that this presents some difficulty, because the problem is, generally, when class actions are settled, and say there is a coupon settlement, I know there' s special problems with coupon settlements, there also is other relief generally granted to the class, it could be in declaratory relief, it's that the defendant is going to stop a practice or they're gonna, going to do some other practice in the future or whatever. And sometimes that other relief is a larger part of the recovery than the coupons or the cash. And we think it is unfair to the class counsel to say that all you're going to get is a proportion of the c-cash or of the coupon... Well, we will try to put some language in that enforces that, and I understand hat [sic] your, concern is, it will help with that concern, but, at the same, if here's [sic] a benefit, you know, in environmental cases this happens all the time where there might be an environmental practice stopped, but the class doesn't really get any cash, or gets very little cash. Then there isn't any impetus given to the plaintiffs counsel to take that case if he's not gonna get compensated."); *see also id.*, Vol. 1, pp. 482-83, C.R. vol. 4, pp. 650-651 (discussing the coupon rule); Vol. 1, pp. 1070-71, C.R. vol. 4, pp. 658-61 (same); Vol. 1, pp. 1141-45, C.R. vol. 4, pp. 663-667 (same); Vol. 1, pp. 1153-1155, C.R. vol. 4, pp. 669-671 (same).

FN12. *See* Northrup, 46 S. TEX. L. REV. at 961 (2005) ("Inspection of the legislative history, however, reveals that this precise concern was raised on more than one occasion. *That the statute was passed without alteration of the language requiring this result rebuts any presumption that some other result was intended.* ") (emphasis added).

Both the plain meaning of Rule 42 and the intent behind its enactment require that the class and its attorneys obtain the same ratio of cash/non-cash benefits. Where, as here, class counsel negotiated no cash amounts for the class, class counsel may not be compensated in cash. Because the terms of Proposed Settlement are inconsistent with both the Texas Civil Practices and Remedies Code and the Rules, the Trial Court erred in entering the Order and Final Judgment.

***11 B. Issue 2: The Trial Court erred in finding that the Stipulation and Settlement was fair, reasonable, and adequate.**

1. The Rules set the Standard for settlement of class action cases generally.

Unnamed class members rely on the provisions of Texas Rule of Civil Procedure 42 to protect their rights in the event of a class action settlement.[FN13]

FN13. See Bloyed, 916 S.W.2d at 953 ("One of the foremost objectives of Rule 42 is to protect the interests of absent class members.").

Among other things, Rule 42 requires the trial court to find, after hearing, that the agreement is "fair, reasonable, and adequate."[FN14] In addition, the court must consider "the respective opinions of the participants, including... the absent class members."[FN15]

FN14. *See* TEX. R. Civ. P. 42(e)(1)(C).

FN15. *See Bloyed*, 916 S.W.2d at 955.

Courts[FN16] also recognize the inherent potential conflict between class counsel on the one hand and class members on the other; thus, the fairness hearing is designed "to ensure that class counsel and the named plaintiffs do not place their own interests above those of the absent class members."[FN17] Specifically, they recognize the very operation of ***12** class actions gives class action lawyers an incentive, whether or not acted upon or even recognized, to negotiate settlements that benefit themselves to the detriment of class members; at the same time, defendants have an incentive to agree to an early settlement regardless of the allocation of settlement proceeds.[FN18] The appearance of a potential

conflict is exacerbated where, as in the Stipulation and Settlement, the defendant responsible for paying the fees enters a "clear sailing" agreement whereby it agrees not object to fees above a certain amount.[FN19]

FN16. The Court may rely on federal class action decisions when interpreting and applying Texas class action rules and standards. *See Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007) (observing that Texas Rule of Civil Procedure 42 was patterned after and later revised to conform to Federal Rule of Civil Procedure 23, and "[t]hus, we rely on our precedents and persuasive federal decisions and authorities interpreting current federal class action requirements").

FN17. *Dennis v. Kellogg Co.*, --- F.3d ----, Case Nos. 11-55674, 11-55706, 2012 WL 2870128, *1 (9th Cir. Jul 13, 2012); see also Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) ("While the conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery, there is also a conflict inherent in cases like this one, where fees are paid by a quondam adversary from its own funds - the danger being that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees."); *see also* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 79-81(2007) ("The defendant wants to minimize outflow of expenditures and the class counsel wants to increase inflow of attorneys' fees. Both can achieve their goals if they collude to sacrifice the interests of the class.") (footnote omitted)).

FN18. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (advising that courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations"); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995), cert. denied sub nom., 516 U.S. 824 (1995) ("Indeed, this court has recognized that 'a defendant is interested only in disposing of the total claim asserted against it; ... the allocation between the class payment and the attorneys' fees is of little or no interest to the defense."'). (citation omitted); *In re Nat. City Corp. Shareholders Litig.*, No. 4123-CC, 2009 WL 2425389, *5 (Del. Ch. Jul 31, 2009) (not designated for publication), aff'd, 998 A.2d 851 (Del. Supr. 2010) ("In class actions, the principals, the claim-holding members of the shareholder class, have little or no role in negotiating the settlement of the action or the fees their agents, the attorneys, will receive in conjunction with the settlement of the claims that belong to them. At most, the principals (the class members) possess the opportunity to object to a proposed award of attorney fees. This Court is required to be vigilant, so that counsel's fee requests do not take advantage of the agent-principal relationship between class action plaintiffs and their attorneys."); *see also Thorogood v. Sears, Roebuck and Co.*, 627 F.3d 289, 293 (7th Cir. 2010) ("What we said was that the structure of class actions under Rule 23 of the federal rules gives class action lawyers an incentive to negotiate settlements that enrich themselves but give scant reward to class members, while at the same time the burden of responding to class plaintiffs' discovery demands gives defendants an incentive to agree to early settlement that may treat the class action lawyers better than the class."), vacated on other grounds, --- U.S. ---, 131 S.Ct. 3060, 3061 (2011); *cfEvans v. Jeff D.*, 475 U.S. 717, 733 (1986) (recognizing "the possibility of a tradeoff between merits relief and attorneys' fees" is often implicit in settlement negotiations).

FN19. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 948 ("Second, the district court should not have ignored the clear sailing fee provision simply because approval of the award was not dependent on the approval of fees. '[T]he very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class.' Therefore, when confronted with a clear sailing provision, the district court has a heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class, being careful to avoid awarding 'unreasonably high' fees simply because they are uncontested.") (citations omitted); *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) ("That the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need carefully to scrutinize the fee award."); *Weinberger*, 925 F.2d at 524 ("Here, as in any similar case, G-P's agreement not to contest fees up to a stated maximum exacerbated the potential conflict of interest between the plaintiff class and class counsel.").

***13 2. The additional disclosures are marginal at best and do not justify the Stipulation and Settlement.**

In return for giving up valuable rights of the class and receiving substantial attorneys' fees to be paid by the Defendants, class counsel obtained marginal disclosures that had no bearing, and frankly could not have had an effect, on the merger transaction itself.[FN20]

FN20. Indeed, they had no effect, as even with the additional disclosures negotiated by class counsel, the Frontier shareholders voted to approve the merger by a 99% vote. See Objection, Exhibit "A," C.R. vol. 1, p. 160, at 175-177.

In order to justify a settlement paying plaintiffs' attorneys' fees in a disclosure-only settlement, the supplemental disclosures must have real substance.[FN21] The mere existence of additional disclosures is insufficient in the absence of materiality. For example, agreed supplemental disclosures about the color of the Chairman of the Board's automobile and the Chief Executive Officer's three favorite episodes of Star Trek would be plainly insufficient to support a settlement, much less six-digit attorneys' fees.

FN21. *See* N. Scott Fletcher (counsel, herein, for Appellees Holly Corporation and North Acquisition, Inc.), *et al.*, *Distrubing Trends in M&A Litigation*, 59 TEXAS STATE BAR LITIG. SEC. REPORT (THE ADVOCATE) at 33 ("Because courts may be skeptical of certain disclosure-only settlements, settling parties should focus on whether the supplemental disclosures have real substance to them.").

The disclosures in this case are not as absurd as those, but they are no more material. The lofty sentiments expressed by the class counsel aside, the additional disclosures are at best supernumerary clarifications and wordsmithing of the language contained in disclosures that were already both accurate and adequate.

***14** For example, class counsel's efforts resulted in

• A disclosure that, unsurprisingly, the merger agreement would include terms which were "reciprocal and customary;"[FN22]

FN22. *See* Form 8-K, C.R. vol. 1, p. 88, at 114 ("*and while no specific terms or amounts were discussed, the board noted that those provisions should be reciprocal and customary*").

• Specifying that Morgan Stanley & Co. Inc., Holly's Financial Advisors, considered, *inter alia*, a specific number of analysts (nine) publishing price targets for both Holly and Frontier, instead of an unspecified number of analysts; [FN23]

FN23. *See* Form 8-K, C.R. vol. 1, p. 88, at 114 ("only with respect to *the nine* analysts that published price targets for both Holly and

Frontier").

• Specifying that Deutsche Bank Securities, Inc., considered, a specific number analysts (eleven) publishing price targets, instead of an unspecified number of such analysts;"[FN24]

FN24. *See* Form 8-K, C.R. vol. 1, p. 88, at 115 ("Deutsche Bank noted that the range of undiscounted equity analyst price targets of Frontier common stock was between $19.00 and $33.00 *pef share and based on a set of 11 equity research analysts who published recent price targets for Frontier common stock.*").

• A disclosure that Morgan Stanley & Co. Inc., would not receive "a portion" of its fees on announcement and a "substantial portion" on completion, but would receive approximately 30% and 70% respectively;[FN25]

FN25. *See* Form 8-K, C.R. vol. 1, p. 88, at 115 ("[I]t will be paid a fee of $5,125,000, $1,500,000 of which became payable at the time of public announcement of the merger and $3,625,000 of which is contingent upon, and will become payable upon, completion of the merger."); *id.*, at unnumbered p. 10 ("Frontier has agreed to pay Citi for its financial advisory services in connection with the merger an aggregate fee of $5 million, a portion of which was payable upon delivery of Citi's opinion and $3.5 million of which is contingent upon completion of the merger.").

• Wordsmithing Credit Suisse Securities (USA), LLC's (Frontier's Financial Advisors) description of its discounted cash flows analysis; and
• Includes a table summarizing information that appears elsewhere in the original proxy statement. [FN26]

FN26. *See* Form 8-K, C.R. vol. 1, p. 88, at 116 ("The following table shall be inserted immediately following the first paragraph under "-Contribution Analysis" on page 69").

***15** After but two months of purported document review, class counsel proposed the Stipulation and Settlement to settle the litigation and give broad releases in exchange for an additional set of meaningless disclosures and no additional consideration to shareholders for the merger, save and except for an award of attorneys' fees to class counsel from the Defendants.

The relief negotiated by counsel for the class that purportedly benefits the class amounts to just over 1,300 words worth of additional disclosure. These superficial disclosures were meaningless and of no effect as the Defendants denied (i) any wrongdoing,[FN27] and (ii) "that any further supplemental disclosure is required under any applicable rule, statute, regulation or law." [FN28]

FN27. *See* Stipulation and Settlement, C.R. vol. 1, p. 88, pp.101-102.

FN28. Stipulation and Settlement, C.R. vol. 1, p. 88, pp.101-102.

And yet, class counsel negotiated a fee amount of $612,500.00 (or over $470 per word of additional disclosure).

The additional disclosures were non-material, were of no import or effect, and cannot justify the releases exchanged for and the attorneys' fees incurred in obtaining them. The Stipulation and Settlement did not justify the releases and consideration provided to class counsel and the Trial Court erred in concluding the Settlement was fair, reasonable, and adequate.

***16 C. Issue 3: The Trial Court erred in approving the Stipulation and Settlement because Notice of the Proposed Settlement was insufficient.**

Each class member has the right to object to a proposed settlement.[FN29] To protect that right, class members are entitled to the "best notice practicable under the circumstances."[FN30] In general, such notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[FN31]

FN29. *See* Tex. R. Civ. P. 42(e)(4)(A).

FN30. *See* Tex. R. Civ. P. 42(c)(2)(A).

FN31. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-175 (1974).

Appellant Kazman, one of the class members, received the Notice on December 5, 2011, giving him but eleven days to review, consider, and ultimately decide to object to the Proposed Settlement and then to engage counsel to do so, and then to prepare and serve an objection. [FN32] The time is even less given that the Notice required any objections were to be filed and served by hand or first class mail (apparently no overnight courier, fax, or email would do) on counsel by the deadline, [FN33] at least one of which counsel is located in California. [FN34]

FN32. *See* Objection, C.R. vol. 1, p. 160, at 171; *see also* Affidavit of Andrew G. Beckord, C.R. vol. 2, p. 318, at 319-320 ("The notification phase began on November 4, 2011 and continued through December 13, 2011 as additional investors and potential Nominee Purchasers were identified.").

FN33. *See* Stipulation and Settlement, Exhibit "C," Notice of Pendency and Settlement of Class Action and Hearing on Proposed Settlement, C.R. vol. 1, p. 88, at 135-36, and Preliminary Approval Order, C.R. vol. 1, p. 149, at 153.

FN34. *See* Stipulation and Settlement, Exhibit "C," Notice of Pendency and Settlement of Class Action and Hearing on Proposed Settlement, C.R. vol. 1, p. 88, at 135-36, and Preliminary Approval Order, C.R. vol. 1, p. 149, at 153.

***17** The issues of timing, notice, and the opportunity to object is important because both the class Plaintiff and Defendants averred at the Trial Court that there is virtually universal "support" for the Proposed Settlement. [FN35]

FN35. *See* Motion to Approve, C.R. vol 3, p. 376, at 390 ("By any measure, that signifies overwhelming shareholder approval of the Settlement."); Defendants' Response, C.R. vol 2, p.179, at 209 ("Class Counsel, Class Plaintiffs and the Absent Class Members All Support the Proposed Settlement.").

That argument is sophistry.

Courts recognize the difference between silence and support; particularly in the context of a class action settlement, silence does not equate to assent. [FN36] Instead, Courts considering a lack of settlement objections have concluded that rather than support, a failure to respond is more likely a function of a combination of ignorance, insufficient ***18** amount of time to object, and a weighing of the costs of objecting against the likely benefits. [FN37]

FN36. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981) ("But further explanation was required, for a low level of vociferous objection is not necessarily synonymous with jubilant support. In many class actions, the vast majority of class members lack the resources either to object to the settlement or to opt out of the class and litigate their individual cases."); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d at 812 ("Even where there are no incentives or informational barriers to class opposition, the inference of approval drawn from silence may be unwarranted."); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1137 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1979) ("When a court evaluates the settlement of a class action brought on behalf of individual shareholders or consumers, it should be reluctant to rely heavily on the lack of opposition by alleged class members. Such parties typically do not have the time, money or knowledge to safeguard their interests by presenting evidence or advan-

cing arguments objecting to the settlement."); *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001) ("There may be many reasons why class members in this case didn't register their concerns about the settlement: lack of interest, time, information, etc. Like the Third Circuit in the General Motors case, the Court is unwilling to automatically equate class silence with a showing of 'overwhelming' support for the settlement."); *see also Christopher R. Leslie*, The Significance of Silence: Collective Action Problems and Class Action Settlement, 59 FLA. L. REV. 71, 73 (2007) ("Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low.").

FN37. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods Liability Litig.*, 55 F.3d at 812 ("[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement... Even where there are no incentives or informational barriers to class opposition, the inference of approval drawn from silence may be unwarranted."); *Mars Steel Corp. v. Continental Illinois Nat. Bank and Trust Co.*, 834 F.2d 677, 680-81 (7th Cir. 1987) ("And where notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a fait accompli."); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d at 1137 ("Acquiescence to a bad deal is something quite different than affirmative support.") (reversing approval of settlement).

In the instant case, two factors heightened the hurdle to respond. First, the proposed settlement involves no cash or monetary compensation to the class. Obtaining counsel, filing an objection, and traveling to the hearing is economically irrational for any individual; indeed, as the class recovery in this lawsuit is quite literally $0.00, it would be economically irrational even to spend even the $5.40 in postage required to serve the objection on the various counsel.

Second, the time to obtain counsel, research the issues, and prepare, file and serve an objection, or to do *so pro se*, is for most simply not feasible. Appellant received the Notice on December 5, 2011,[FN38] giving him but eleven days to review, consider, and ultimately decide to object to the Proposed Settlement and then to engage counsel to do so.[FN39]

FN38. *See* Objection, C.R. vol 1, p. 160, at 171.

FN39. The lack of time and the hurdles in place to object could be construed as a means to artificially limit the number of objections. See Leslie, 59 FLA. L. REV. at 97 ("A dearth of information coupled with administrative hurdles and a short response period can combine to make any meaningful objection impractical.").

***19** In failing to overcome hurdles placed by the Notice, it simply cannot be said that "the class members have given their resounding approval to the proposed settlement."[FN40]

FN40. *See* Motion to Approve, C.R. vol 3, p. 376, at 390 ("By any measure, that signifies overwhelming shareholder approval of the Settlement."); *see also* Defendants' Response, C.R. vol 2, p.179, at 209 ("Class Counsel, Class Plaintiffs and the Absent Class Members All Support the Proposed Settlement.").

Because the notice to the class was not the best practicable under the circumstances and was not calculated to afford the class members an opportunity to present their

objections, the Court erred in approving the Stipulation and Settlement.

D. Issue 4: The Trial Court erred in finding that the class representatives fairly and adequately protected the interests of the class.

Because plaintiffs brought this litigation, corporate assets have been depleted to pay defense attorneys and, pursuant to the settlement, the plaintiffs' attorneys. By contrast, the shareholders received nothing of value whatsoever. Thus, this shareholder litigation made shareholders worse off than had it not been brought at all.

Under Texas Rule of Civil Procedure 42(a)(4), representative parties may bring a class action "only if... the representative parties will fairly and adequately protect the interests of the class." [FN41] As this settlement demonstrates, the representative parties were looking out not for the interests of the class, but instead for the interests of their attorneys *at the expense of the class.*

FN41. TEX. R. Civ. P. 42(a)(4).

***20** As observed by the Seventh Circuit Court of Appeals,

That the plaintiffs say they have other investors' interests at heart does not make it so... The only goal of this suit appears to be fees for the plaintiffs' lawyers. It is impossible to see how the investors could gain from it.... [FN42]

FN42. *Robert F. Booth Trust v. Crowley,* --- F.3d ---, Case No. 10-3285, 2012 WL 2126314, *3 (7th Cir. Jun 13, 2012).

In such a case, the proper result is to refuse to certify the class for failure to meet the adequacy requirement. [FN43] The district court erred in failing to do so.

FN43. *See In re Aqua Dots Prods. Liability Litig.,* 654 F.3d 748, 752 (7th Cir. 2011).

E. Issue 5: The Trial Court erred in awarding attorneys' fees to class counsel without holding a hearing, considering, or entering findings and conclusions as to their reasonableness and necessity.

1. Attorneys' fees awards are subject to the strictures of Rule 42

Texas Rule of Civil Procedure 42 requires that Court consider more than just an agreement in order to award attorneys' fees as part of a class action settlement and instead requires any request for fees by scrutinized. [FN44] Given the level of class recovery and the proposed fee award, the Stipulation and Settlement does not survive scrutiny and should never have been approved. [FN45]

FN44. *See* Tex. R. Civ. P. 42(i).

FN45. *See also, e.g.,* Ashley Post, *Delaware judges shrink fees to plaintiffs lawyers,* Inside Counsel, July 19, 2011, *available at* http://www.insidecounsel.com/2011/07/19/delaware-judges-shrink-fees-to-plaintiffs-lawyers ("The goal among many plaintiffs firms is to settle quickly and score big legal fees, which can be as large as $500,000. However, the Wall Street Journal reports that Delaware judges are significantly slashing fees down to about $75,000. 'Delaware is now almost actively hostile toward cases they think are without merit,' said Larry Hamermesh, a professor at Widener's Institute of Delaware Corporate Law, to the Wall Street Journal. 'They are saying, 'Don't waste my time with this stuff.'").

***21** Texas Rule of Civil Procedure 42(h) provides that

In an action certified as a class action, the court may award attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.
(3) Hearing and Findings. The court must hold a hearing in open court and must find the facts and state its conclusions of law on the motion. The court must state its findings and conclusions in writing or orally on the record.[FN46]

FN46. TEX. R. Civ P. 42(h).

Then, Texas Rule of Civil Procedure 42(i) provides that In awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range of 25% to 400% of the lodestar figure. In making these determinations, the court must consider the factors specified in Rule 1.04(b), Tex. Disciplinary R. Prof. Conduct.[FN47]

FN47. TEX. R. CIV P. 42(i).

The analysis of settlements, including any award of attorneys' fees, is particularly important in class actions where non-participating class members rely on the Trial Court and provisions of Texas Rule of Civil Procedure 42 to protect their rights.[FN48]

FN48. *See Bloyed*, 916 S.W.2d at 953 ("One of the foremost objectives of Rule 42 is to protect the interests of absent class members.").

***22** Courts recognize that where, as in the instant case, class counsel is in the position of negotiating both its own fees as well as class recovery, there is an inherent potential conflict and, as a result, fee awards should be subject to heightened scrutiny.[FN49]

FN49. *See Bloyed*, 916 S.W.2d at 957 ("[T]he potential conflict between absent class members and class counsel is one of the serious problems with class action settlements."); see id., 916 S.W.2d at 961 ("The defendant's economic concerns consist only of the total value of the settlement, including attorney's fees and expenses. Unlike class counsel, the defendant has no economic interest in the allocation of settlement funds between the class members and counsel for the class."); *see also* David B. Parrish, *The Dilemma: Simultaneous Negotiation of Attorneys' Fees and Settlement in Class Actions*, 36 Hous. L. REV. 531, 534 (1999) ("The concern is that the attorney in a class action will be so worried about recovering the greatest amount of fees that he or she will overlook the duty to his or her client to seek the largest possible recovery for that client ... The net effect of the client's lack of attorney monitoring in class action litigation is that the class action lawyer functions essentially as an 'entrepreneur.' Therefore, the attorney bears a tremendous amount of risk in the litigation, exercising almost absolute control over crucial case decisions. This situation increases the likelihood that the attorney in a class action 'will serve her own interest at the expense of the client."') (citations omitted).

2. The Trial Court did not perform the required analysis or enter any findings and conclusions in support of the fee award.

But for a single sentence without any foundation, the Trial Court made no analysis of the fee request or the fee award.[FN50] Certainly no competent evidence was presented in support of the fee request, and neither the Trial Court nor the parties engaged in either a lodestar analysis or a consideration of the 1.04(b) factors.[FN51]

FN50. *See* Order and Final Judgment, C.R. vol. 4 p. 676, at 684.

FN51. *See generally* Order and Final Judgment, C.R. vol. 4, p. 676.

Putting aside that class counsel did not allege any claim that would entitle it to fee switching in the first place,[FN52] class counsel failed to provide any competent evidence that the requested fees are reasonable in terms of the hours spent or the rates charged. Even in ***23** the

affidavits filed in support of the Motion to Approve Settlement, there is no evidence (i) as to the reasonableness of the tasks performed or the time spent in performing them, or (ii) that the rates charged are remotely comparable to the rate actually charged for similar actions in similar communities.[FN53] Given the high amount of the negotiated attorneys' fees, "the court 'needed to do more to assure itself - and [the appellate court] - that the amount awarded was not unreasonably excessive in light of the results achieved.'"[FN54]

FN52. Texas Courts follow the "American Rule." *See 1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 382 (Tex. 2011) ("Texas adheres to the American Rule for the award of attorney's fees, under which attorney's fees are recoverable in a suit only if permitted by statute or by contract."). Plaintiff only brought claims for breach of fiduciary duty and aiding and abetting. *See* Plaintiff's First Amended Class Action Petition, C.R., vol. 1, p. 59, at 79, 82-85. There is no statute calling for fee switching for such claims. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 38.001.

FN53. *See, e.g.*, Affidavit of Kristy Williams in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, C.R. vol. 3, p. 428.

FN54. *Dennis v. Kellogg Co.*, --- F.3d ----, 2012 WL 2870128, *10 (*quoting In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 948).

Even if this Court were to construe the Motion to Approve the Settlement as to be or to include a Motion for the Award of Fees, the Trial Court neither held a hearing in open court[FN55] nor made oral or written findings of fact or conclusions of law.[FN56] Consequently, the trial court failed to comply with the Rules and to meet the rigorous standards of transparency and fairness necessitated by the consideration of a class action attorneys' fee award.[FN57]

FN55. Moreover, the hearing to approve the Proposed Settlement is inconsistent with Rule 42(h), which requires a separately noticed hearing to consider the reasonableness and necessity of the requested fees. *See* TEX. R. Civ. P. 42(h).

FN56. Tex. R. Civ P. 42(h). Appellant requested entry of findings and conclusions. *See* Request for Findings of Fact and Conclusions of Law, C.R. vol. 4, p. 693; Notice of Past Due Findings of Fact and Conclusions of Law, C.R. vol. 4, p. 711.

FN57. *See In re High Sulfer Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 229 (5th Cir. 2008).

***24 3. The requested fee award is in any event unsustainable.**

As observed by counsel for two of the Appellees, Courts are wary of settlements in merger cases, and have rejected agreed-upon attorneys' fee awards, where the plaintiff's counsel is unable to demonstrate that the settlement provides sufficient benefits to the shareholders.[FN58]

FN58. *See* N. Scott Fletcher (counsel, herein, for Appellees Holly Corporation and North Acquisition, Inc.), *et al., Distrubing Trends in M&A Litigation*, 59 Texas State Bar Litig. Sec. Report (the Advocate) at 32 ("The business and legal press have reported that Delaware courts have increasingly taken a hard look at settlements in merger cases and have rejected agreed-upon attorney fee awards to plaintiff's counsel who have not been able to demonstrate that the settlements provide sufficient benefits to the shareholders by way of valuable additional disclosures, changes in the transaction terms, or otherwise.").

In considering the case of a class counsel negotiating only additional disclosures in advance of a merger for the class, but fees for itself, at least one court found that [p]laintiffs' counsel only achieved meager additional

disclosures that failed to be significant enough to warrant placement as an amendment to the proxy statement and were only reported on NCC's form 8-K. No evidence exists that the additional disclosures significantly affected the outcome of the shareholder vote. Indeed, NCC's shareholders overwhelmingly voted in favor of the merger. Moreover, plaintiffs' counsel, after winning an early motion to expedite, did not press any subsequent motion and only deposed two witnesses. This effort, regardless of the amount of hours spent, does not justify a fee award of $1.2 million, especially since the benefit obtained for the shareholder class was miniscule. Thus, I will not defer to the negotiated fee in this case.[FN59]

FN59. *See In re Nat. City Corp.*, 2009 WL 2425389, *6.

Similarly, in another recent class action settlement case - where there was no cash award to the class but class counsel nonetheless negotiated an award of its own fees - the Colorado District Court found that the attorneys were only entitled to be compensated for ***25** time spent on tasks that produced a benefit to the shareholders,[FN60] and the fees were substantially reduced where the additional disclosures were "not very substantive"[FN61] and were relatively short.[FN62] For the Finkel Court, such meager additional disclosures, even if they provided a marginal benefit to class, did not warrant an award of the requested fees.[FN63] That is, of course, precisely the circumstance here.

FN60. *See Finkel v. American Oil & Gas, Inc.*, Case Nos. 10-CV-01808-CMA-MEH, 10-CV-01833-PAB-MEH, 10-CV-01846-MSK-KMT, and 10-CV-01852-MSK-MJW, 2012 WL 171038, *4 (D. Colo., Jan. 20, 2012) ("Accordingly, Plaintiffs are entitled to compensation only for the time spent on tasks that produced a benefit for the shareholders.").

FN61. *See Finkel*, 2012 WL 171038, slip op. at *2 ("Second, although some of the supplemental disclosures conferred a benefit on the shareholders, taken together they are not very substantive. None of them altered the financial terms of the merger or the consideration offered, corrected a prior misstatement, or introduced a previously undisclosed topic of disclosure. In fact, some of the supplemental disclosures further substantiated Defendants' position, which they have maintained since the suit was filed, that the merger price and process were fair.").

FN62. *See Finkel*, 2012 WL 171038, slip op. at *2 ("First, the supplemental disclosures, which were effectively line edits to the Proxy statements, represent a small fraction of the total disclosures made. All told, the supplemental disclosures amount to approximately one-and-a-half pages of additional information.").

FN63. *See Finkel*, 2012 WL 171038, slip op. at *3 ("Such disclosures, and even those which provided some actual benefit to the shareholders, do not merit the amount of fees Plaintiffs request.").

Like that settlements in *Finkel* and *In re Nat. City Corp.*, the Stipulation and Settlement provide meager disclosures published in an 8-K, the disclosures did not affect the outcome and the shareholders overwhelmingly approved the merger, class counsel engaged in neither significant discovery nor motion practice, and requested fees are not justified.[FN64]

FN64. *See also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970) ("Where an action by a stockholder results in a substantial benefit to a corporation he should recover his costs and expenses... [A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest.").

***26** Because there was insufficient evidence to determine if the fees requested were either reasonable or necessary, and because the Trial Court did not perform any analysis to determine the reasonableness or necessity of the requested fees, the Trial Court erred in entering the Order and Final Judgment which failed to discount or disallow the requested fees.

CONCLUSION AND PRAYER FOR RELIEF

Plaintiffs brought a strike suit to benefit their own attorneys at the expense of the class they are supposed to represent. The Texas legislature has made clear that it does not stand for such abuses of the class action system, and the Texas Supreme Court adopted rules specifically designed to curb such abuses. This Court should follow that mandate as well as the federal courts that refuse to approve settlements consisting of self-dealing for the benefit of the attorneys.

WHEREFORE, Appellant requests that this Court (i) reverse the order and Final Judgment of the Trial Court and remand, and (ii) grant to him such other relief to which he may be entitled.

Appendix not available.

Sam KAZMAN, Appellant, v. FRONTIER OIL CORPORATION, et al., Appellees.
2012 WL 3589816 (Tex.App.-Hous. (14 Dist.)) (Appellate Brief)

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