EFiled: Jan 13 2005 4:01PM EST
Filing ID 4943034

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

--X		
IN RE COX COMMUNICATIONS, INC. SHAREHOLDERS LITIGATION	: :	Consolidated C.A. No. 613-N
--X		

OBJECTION TO PLAINTIFFS' APPLICATION
FOR AWARD OF ATTORNEYS' FEES

Jeffrey Zoub and Franklin Mutual Advisors LLC ("Objectors"), by and through their attorneys, hereby respectfully object to the requested award of attorneys fees in the settlement of this action. The reasons for the objection are as follows.

I. INTRODUCTION

This objection is filed by Jeffrey Zoub and by eleven funds managed by Franklin Mutual Advisers LLC (collectively "Franklin Mutual Funds"). Mr. Zoub and Franklin Mutual Funds are members of the plaintiff class, which includes all record and beneficial holders of Class A common stock of Cox Communications, Inc. ("CCI") from August 2, 2004 through December 8, 2004. As of August 2, 2004, Mr. Zoub was the beneficial owner of 1,000 shares of Class A CCI common stock. Franklin Mutual Funds purchased a total of 509,000 shares of Class A CCI common stock between August 26, 2004 and October 10, 2004.[1] The Objectors take no position with respect to whether this Court should approve the proposed settlement. However, Objectors object to plaintiffs' attorneys' anticipated petition for a fee award of $4,950,000 and urge that it

[1] A schedule of the eleven Funds and the amounts and dates of their purchases is attached hereto as Exhibit A.

be denied.[2]

In brief, Objectors urge that plaintiffs' attorney's fee petition be denied for the following reasons:

First, this Action exemplifies a ritualized class action litigation process that has become common in this Court. The dynamics of that process are inconsistent with *Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701 (1983) (hereinafter "*Weinberger*"), and subsequent decisions of the Delaware courts, which (a) make clear that a committee comprised of independent directors of the target of a cash-out merger (hereinafter a "SNC") should have an opportunity to negotiate, at arm's length, a transaction that is entirely fair to the minority shareholders and (b) hold that to survive a motion to dismiss, a suit challenging a cash-out merger must allege specific acts of fraud, misrepresentation, or other misconduct by the controlling shareholder or the target company. Here, plaintiffs' attorneys filed premature challenges to the proposed cash out of CCI's public shareholders and then free rode on the efforts of the SNC appointed by CCI's board of directors. The Court should not reward plaintiffs' attorneys for their role in this process.

Second, when plaintiffs filed their complaints they did not possess knowledge of provable facts that held out some reasonable likelihood of ultimate success. Thus, *Chrysler Corp. v. Dann,* Del. Supr., 223 A.2d 384, 387 (1966), and *Allied Artists Pictures Corp. v. Baron*, Del Supr., 413 A.2d 876, 879 (1980), require that this Court deny plaintiffs' attorneys' petition for a $4,950,000 fee award.

Third, the record in this case suggests that plaintiffs' efforts had little if any impact on the

---

[2] It is Objectors' understanding that plaintiffs' attorneys have not yet filed their fee petition or their brief in support thereof and are unlikely to do so until some time after the date on which objections must be filed with the Court. Consequently, after examining that petition and brief, the Objectors might request more time from this Court to respond to the arguments made therein.

terms of the transactions ultimately approved by the SNC and CCI's full board of directors. Consequently, if the Court does not deny in its entirety plaintiffs' attorneys' petition for a $4,950,000 fee award, it should award plaintiffs' attorneys only a small fraction of the $4,950,000 fee they say they will request.

Fourth, the record makes clear that plaintiffs' attorneys bore virtually no contingency risk with respect to this Action and that they devoted substantial amounts of time and energy to maneuvering to gain control of this Action. The Court should limit any fee it awards to reasonable hourly compensation for the work that plaintiffs' attorneys actually performed on behalf of the plaintiff class.

II. FACTUAL BACKGROUND

The Notice of Settlement ("Notice") sets forth in detail many facts relating to the transaction at issue in this case, in which Cox Enterprises, Inc. ("CEI") cashed out the public shareholders of CCI by means of a tender offer and second-step, short-form merger, and to the conduct of this Action. For purposes of this Objection, we largely accept as true the facts set forth in the Notice and do not reiterate them herein. However, we set forth below certain additional facts — drawn from the docket sheet in this Action, complaints and other documents filed with this Court, and public sources — that cast additional light on those transactions and this Action, and also highlight the significance of certain facts set forth in the Notice.

First, and perhaps most importantly, as set forth in the Affidavit of Lawrence J. White ("White Affidavit") and the study attached thereto,[3] the course of this Action was predictable from the moment CEI announced its plan to cash out CCI's public shareholders: Plaintiffs'

[3] Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions* (June 2, 2004) (hereinafter "*File Early, Then Free Ride*").

attorneys filed multiple premature complaints, beginning just hours after CEI announced its offer. CCI appointed a SNC, which retained its own legal and financial advisers. Defendants, however, did not seek to have plaintiffs' complaints dismissed.[4] Rather, Defendants "played along" by providing plaintiffs' attorneys with merger-related documents and inviting them to make a presentation to CEI's financial advisers. The SNC then negotiated an increase in price and a majority of the minority provision. Plaintiffs agreed to accept the deal negotiated by the SNC. Defendants, in exchange, acknowledged that they had taken notice of plaintiffs' efforts. Following confirmatory discovery, plaintiffs formally agreed to dismiss the consolidated complaint and grant defendants a broadly-worded release, in exchange for which defendants agreed to pay an attorneys' fee of up to $4,950,000, if awarded by the court.

Class action litigation that follows this pattern provides plaintiffs' attorneys with extraordinarily generous compensation and also provides defendants with a kind of "litigation insurance" but — because of the risk-reward calculation that plaintiffs' attorneys must make — provides little assurance that the terms of a cash-out merger are fair to the shareholders on whose behalf the action purportedly has been filed. More specifically, as explained by Professor White in *File Early, Then Free Ride*, this and similar class actions serve largely as vehicles that allow plaintiffs' attorneys to reap generous fee awards by free riding on the efforts of SNCs.

In this Action:

1. CEI was the controlling shareholder of CCI. At the time CEI decided to cash out CCI's public shareholders, it owned a 62% equity interest in CCI and held a 73% voting interest.

---

[4] As noted above, Defendants did resist Black's effort to have an expedited hearing on a motion for a preliminary injunction.

2. At 4:06 a.m. in the morning of August 2, 2004,[5] CEI publicly announced that it was offering to acquire the CCI Class A common stock (the "Shares") that it did not already own for $32 cash per Share. CEI's press release announcing this offer also stated:

> CEI expects the Board of Directors of CCI to form a special committee of independent directors to consider the proposal with the assistance of outside financial and legal advisors and to negotiate the proposal with CEI. ***Directors of CCI affiliated with CEI will not participate in the evaluation of the proposal, which requires the approval of the special committee.***[6]

3. At the time CEI made this offer, CCI's seven-member board of directors included only three directors – Janet M. Clarke ("Clarke"), Rodney W. Schrock ("Schrock") and Andrew Y. Young ("Young") – who were not members of management or otherwise affiliated with CEI. It thus was predictable that these directors would be the members of the SNC that CEI had asked CCI's board to form

4. CEI's announcement triggered an avalanche of class action complaints. The first, *Smith v. Cox Communications, Inc., et al.* (C.A. No. 613-N), was filed less than five hours later, at 8:36 a.m that Monday morning. By noon of that day, five *additional* class action complaints were filed[7] and a sixth *additional* complaint was filed later in the day.[8] Eventually six more class action complaints were filed in Delaware, bringing the total number of complaints filed in

---

[5] All relevant events occurred in 2004. We shall hereafter refer to those dates by month and day only, as does the Notice.

[6] 8/2/04 PRWIRE 04:06:00 (available through WestMate) (emphasis added). CEI also confirmed that it was unwilling to sell its interest in CCI or to allow CCI to be sold to a third party.

[7] *Wilson v. Kennedy, et al.*, C.A. No. 614-N (filed 9:28 a.m.); *Steiner v. Cox Communications, Inc., et. al.*, C.A. No. 615-N (filed 11:10 a.m.); *Guerin v. Cox Enterprises, Inc., et. al.*, C.A. No. 616-N (filed 11:22 a.m.); and *Eastside Investors, LLP. v. Kennedy, et al.*, C.A. No. 617-N (filed 11:43 a.m.).

[8] *Hill v. Cox Communications, Inc., et al.*, C.A. No. 619-N (filed 4:18 p.m.).

Delaware to 13. Three more class action complaints were filed in Georgia, where CEI and CCI had their headquarters.

5. Objectors have examined seven of the Delaware complaints, including those filed by Shiffrin & Barroway, LLP ("Shiffrin & Barroway"); Abby Gardy, LLP ("Abby Gardy"); Milberg Weiss Bershad & Schulman LLP ("Milberg Weiss"); and Prickett, Jones & Elliott, P.A. ("Prickett Jones"), all of which are now members of plaintiffs' Executive Committee.[9] Some, including the complaints filed by Shiffrin & Barroway and Abby Gardy, do not even acknowledge that CEI had made its offer subject to approval by a SNC of the CCI board . Other complaints explicitly or implicitly acknowledge that CEI's offer was subject to the approval of a SNC but then simply assert that none of CCI's directors could be expected to act independently. None of those complaints pled any facts which, if true, would be sufficient to raise a reasonable doubt as to the independence of Clarke, Schrock or Young. Moreover, no such facts appear at any point in the record in this Action.[10]

6. The SNC appointed by the CCI board, comprised of Clarke, Schrock and Young, retained distinguished legal and financial advisers — Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank") and Goldman, Sachs & Co. ("Goldman Sachs"). Together with these advisers, the SNC acted as a vigorous advocate of the interests of CCI's public shareholders. The SNC first *rejected* CEI's suggestion that it not base its analysis of CCI's value on the long-range

---

[9] The first three of these firms accounted for the first, second and fourth complaints filed. Pricket Jones filed *Black v. Cox Communications, Inc., et al.*, C.A. No. 630-N, on August 6. We have not identified the complaint filed by the fifth member of the Executive Committee, Bernstein Liebhard & Lifshitz, LLP.

[10] Thus, we have no reason to believe that any such facts are pled in any of the complaints we did not examine.

plan developed by CCI's management. *Well before plaintiffs raised the issue*, the SNC requested that CEI make its offer subject to a non-waivable majority of the minority provision. The SNC initially sought a price of *$37.00 per share*. It *rejected* two lower, but improved, interim offers from CEI, each of which CEI claimed represented its highest, best and final offer. As a result of these efforts, the SNC was able to secure from CEI an agreement to offer $34.75 cash per Share and to make that offer subject to a non-waivable majority of the minority condition.

7. Well before the SNC began its work, plaintiffs' attorneys started to maneuver to gain control of these Actions. Prickett Jones, which had filed a complaint on behalf of Andrew Black ("Black"), sought both (a) an order consolidating the actions that had been filed and naming it as lead counsel and (b) an expedited hearing on a motion for a preliminary injunction.

8. Neither of these efforts was successful. The latter precipitated a ruling by this Court that suggested that Black's complaint and those filed by the other plaintiffs all were premature. The Court ruled that it "would allow [the SNC] to evaluate the $32-per-share buyout proposal ... before considering a bid for an injunction to block the deal."[11] The Court also advised plaintiffs' attorneys that "[i]f the special committee negotiates a better deal, lawyers for shareholders could drop their attack."[12]

9. Undeterred, plaintiffs' attorneys continued their maneuvering. Attorneys representing a group identified as the "M & R Plaintiffs" and attorneys for Black both filed

---

[11] The quoted statement is drawn from *8/24/04 DJNS 16:23:00* (available through Westmate). The docket sheets in C.A. No. 613-N and C.A. No. 630-N contain no entry indicating that a hearing was held on August 24, and Objectors have not been able to locate a transcript of that hearing. We have relied on this Dow Jones News Service ("DJNS") report as a correct account of what occurred.

[12] *Id.*

extensive pleadings in support of their claims to be appointed lead counsel. Before the Court resolved that issue, they apparently decided to work together, or at least reached some agreement on how they would "divide the pie." On August 30, attorneys for all plaintiffs submitted an order proposing to consolidate the 13 Delaware class actions and appoint a plaintiffs' Executive Committee comprised of the five firms named above.

10. Even though the Court's denial of Black's motion for expedited proceedings seemed to signal that the Court also would deny any effort by plaintiffs to compel discovery before the SNC had completed its work, defendants' attorneys elected not to resist all of plaintiffs' discovery requests. Defendants' attorneys did not agree to or schedule any depositions, but they did produce documents to plaintiffs' attorneys on a rolling basis and also arranged a telephonic meeting at which plaintiffs' attorneys and their financial advisor had an opportunity to present their assessment of the fair value of CCI and their demand that the proposed cash out be subject to a majority of the minority condition. By so proceeding, defendants' attorneys also set the stage for an eventual settlement of this Action by providing plaintiffs' attorneys with a basis to claim that their efforts had contributed to any improvement in the terms of CEI's offer that the SNC was able to negotiate.[13] Nonetheless, the Notice makes clear that, *prior to this meeting*: (a) the SNC already had informed CEI of its desire for a majority of the minority condition; and (b) the SNC also had made clear it would reject an improved offer of $33.50 cash per share and had informed CEI that it considered $37.00 cash per Share to represent the fair value of the Shares.

11. There were no further meetings between plaintiffs' attorneys and Defendants.

---

[13] In making these observations, Objectors do not intend to call into question the good faith of the SNC. In fact, we have noted above that the SNC appears to have been a vigorous advocate for the interests of CCI's public shareholders.

However, the SNC and CEI continued to negotiate intensively. Finally, on October 15, Ms. Clarke (for the SNC) and Mr. Kennedy (for CEI) agreed in principle to a price of $34.75 cash per Share, subject to a majority of the minority condition. Ms. Clarke then advised Mr. Kennedy that "as part of a final agreement on a transaction," this Action also should be settled. Mr. Kennedy agreed and instructed CEI's attorneys to contact plaintiffs' attorneys.

12. The Notice does not detail what CEI's attorneys said, but it seems likely that they made clear to plaintiffs' attorneys that (a) CEI would not further increase the price it would pay; (b) CEI had already agreed to a majority of the minority provision; and (c) if plaintiffs' attorneys decided to challenge the deal negotiated by the SNC, CEI would resist. CEI's attorneys also may have advised plaintiffs' attorneys that if they decided to acquiesce in the deal negotiated by the SNC, CEI was prepared to acknowledge their efforts in some fashion in a Memorandum of Understanding ("MOU") that the parties then would sign. This seems likely both because such acknowledgments have become a standard part of MOUs in cases such as this and because Defendants had already set the stage for such an acknowledgment by providing plaintiffs' attorneys with the opportunity to meet with CEI's financial advisers.

13. Plaintiffs' attorneys then faced a choice. If they elected to challenge the deal negotiated by the SNC, a hard road lay ahead. The record in this case contains nothing suggesting that they could successfully have called into question either the independence of any of the members of the SNC or the fairness of the process by which CEI negotiated with the SNC. Consequently, given the rule set forth in *Kahn v. Lynch Communication Systems, Inc.*, Del. Supr., 638 A.2d 1110 (1994), plaintiffs' attorneys would have had the burden of convincing the court that the price negotiated by the SNC, which would be supported by fairness opinions from Goldman Sachs and from CEI's financial advisers, was unfair. On the other hand, (as we explain

in the next two paragraphs) if they acquiesced in the deal negotiated by the SNC, they would have had every reason to believe that a large fee award was virtually assured.

14. As we note above, Defendants could be reasonably counted on to acknowledge plaintiffs' attorneys' efforts in the MOU. Moreover, although we do not suggest that plaintiffs' attorneys discussed with Defendants the size of the fee award that Defendants would be prepared to finance, plaintiffs' attorneys had strong reasons to believe that it would be very large. First, the transaction at issue involved more than $7 billion and the additional consideration negotiated by the SNC totaled about $680 million. Second, Defendants were engaged in concurrent negotiations of a MOU with attorneys for plaintiffs in the Georgia actions. That MOU expressly contemplated payment by Defendants of up to $1,250,000 in fees to the attorneys for the Georgia plaintiffs. It also surely signaled to the plaintiffs' attorneys in this Action that Defendants were likely to be prepared to pay them significantly more.

15. Three days later, the parties signed a MOU that contained, *inter alia*, an acknowledgment by Defendants of the efforts of plaintiffs' attorneys. Following confirmatory discovery, the parties then signed a formal Stipulation of Settlement that included the substantive terms of the MOU and also included Defendants' agreement not to contest, and to pay, an attorney fee award of up to $4,950,000.[14] The Stipulation also contained CEI's formal acknowledgment

> that it took into account the desirability of satisfactorily addressing the claims asserted in the Action in agreeing to the foregoing terms of and conditions to the Tender Offer and the Merger, and that the efforts of plaintiffs' counsel in the Action

---

[14] The Stipulation also provides for a very broadly worded release from any claims that had been made or could be made in connection with the contemplated tender offer and merger.

> were causal factors that led to (i) the increased consideration offered to CCI minority stockholders in the Tender Offer and Merger and (ii) the Majority of the Minority Condition.[15]

II. PLAINTIFFS' PETITION FOR ALMOST $5 MILLION IN FEES SHOULD BE DENIED

Objectors believe there are at least four reasons why this Court should deny plaintiffs' attorneys petition for a fee award of $4,950,000 or, at most, should award them far less than the enormous fee that they intend to request. They are as follows:

A. The Dynamics of this Litigation Process are Inconsistent with *Weinberger*

As Professor White has pointed out, class actions challenging cash-out mergers involve a highly ritualized and predictable process, much like a Japanese Kabuki dance. *File Early, Then Free Ride*'s prediction of the typical pattern of events in cases such as this, drafted "***months before the present case arose***, . . . [nonetheless] fits . . . extremely well" the events in this case.[16]

This pattern of litigation activity cannot be reconciled with the transactional dynamic implicitly endorsed by *Weinberger* and its progeny. *Weinberger* strongly suggests that the best way to ensure the fairness of a cash out merger is for the board of the target company to appoint a SNC, comprised of independent directors, that would negotiate at arm's length with that company's controlling shareholder. *See Weinberger*, 701 A.2d at 709, n.7. Subsequent decisions by this Court and the Delaware Supreme Court have refined that guidance, and in the years since *Weinberger* was handed down virtually all cash-out mergers have been structured in a fashion

---

[15] The Stipulation also notes that plaintiffs' attorneys had reviewed and commented on "preliminary disclosure materials" but contains no claim that the comments of plaintiffs' attorneys resulted in any changes in those materials.

[16] White Affidavit at 7 (emphasis in original).

consistent with the guidance provided by those courts. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work*, 44 UCLA L.REV. 1009 (1997) (describing process).

The *Weinberger* Court also sought to rein in unnecessary litigation. It held that "the plaintiff in a suit challenging a cash-out merger must allege specific acts of fraud, misrepresentation, or other items of misconduct to demonstrate the unfairness of the merger terms to the minority." *Id.* at 703. If the plaintiff does not, his suit should be dismissed. Implicit in this holding is the notion that, assuming the target's board creates a SNC, no challenge to the SNC's actions will lie until the SNC, and the full board of the target company, have agreed to final terms for the cash-out merger. Until a SNC has done its work, or at least tried to carry out its responsibilities, no plaintiff will be in a position to "allege specific acts of fraud, misrepresentation, or other items of misconduct [sufficient] to *demonstrate* the unfairness of the merger terms to the minority."

Yet despite these holdings, a process has developed whereby in the typical case, (a) class action complaints are filed almost immediately after the announcement of a proposed cash-out merger; (b) the target company's board of directors appoints a SNC, which retains its own legal and financial advisers; (c) defendants elect to "play along" with the efforts of plaintiffs' attorneys, rather than seeking to have the class actions dismissed as prematurely filed; (d) plaintiffs eventually agree to settle for whatever improvements in terms the SNC has negotiated; and (e) defendants acknowledge that plaintiffs' efforts contributed in some fashion to those improvements and agree to pay, up to some agreed upon amount, whatever attorney fee the court awards.

As pointed out above, this litigation dynamic cannot be reconciled with *Weinberger* and its progeny. It also is objectionable because it reduces, if not eliminates, the prospect that

plaintiffs' attorneys will scrutinize rigorously the deals agreed to by SNCs. As is pointed out by Professor White and in *File Early, Then Free Ride*, there were 62 instances in which class actions challenging cash outs and other mergers involving conflicts of interest were filed in the years 1999-2001; *in not a single instance did plaintiffs elect to continue their challenge after a SNC had negotiated some improvement in the terms that initially had been proposed.* Moreover, we are not aware of any case filed subsequent to 2001 in which a shareholder represented by a member of what Professor White identifies as the "traditional Delaware plaintiffs' bar" has elected to challenge the fairness of an agreement reached by a SNC.[17]

It may be that all SNCs are doing a terrific job,[18] but given the litigation dynamic that currently prevails, it is hard to know whether that is the case. Moreover, both in these cases and more generally, at the point at which plaintiffs' attorneys must decide whether to challenge a deal negotiated by a SNC, their interests conflict acutely with those of the shareholders that they purport to represent. If those attorneys agree to settle, they are virtually guaranteed a substantial fee, payable by defendants and thus unlikely to be challenged by a member of the plaintiff class. If they persist and challenge the deal negotiated by the SNC, the plaintiff class might ultimately receive additional consideration, but its attorneys run a real risk that their litigation efforts will fail, *see Kahn v. Lynch Communication Systems, Inc.*, 669 A.2d 79 (1995), and they will end up empty handed.

Attorneys for plaintiffs in these Actions no doubt will argue that, in this and similar

---

[17] In contrast, shareholders with substantial stakes in cash-out targets have achieved substantial success in appraisal proceedings. *See, e.g., Prescott Group Small Cap, L.P. v. The Coleman Company*, 2004 WL 2059515 (Sept. 8, 2004).

[18] As noted above, the SNC appointed by the CCI board of directors appears to have diligently carried out its responsibilities.

cases, they perform a valuable monitoring function. We believe the opposite to be the case. When those attorneys are allowed to prematurely challenge a cash-out merger, they largely become "toothless tigers." This Court could promote more effective (and less costly) monitoring of the fairness of cash-out mergers by denying plaintiffs' attorneys' petition for a $4,950,000 fee award in this Action on the grounds that this suit was prematurely filed. That would serve to eliminate the incentive for plaintiffs' attorneys to free ride on the efforts of a SNC and would provide them with a substantial incentive to scrutinize rigorously the terms of cash-out mergers approved by SNCs and to challenge only those that they then conclude are not entirely fair.

One atypical fact makes this a particularly suitable case in which the Court should take such action. Recall that the MOU in the Georgia action *was negotiated and signed concurrently with the MOU in this* Action. Thus, when plaintiffs' attorneys in this Action agreed in principle to drop their claims, they had a virtual guarantee — in addition to an expectation based on prevailing custom — that Defendants would concur in a request by them for a fee award substantially larger than the $1,250,000 that Defendants already had agreed to pay in the Georgia actions. This fact, alone, would justify a decision by this Court to deny plaintiffs' attorneys petition.

B. Plaintiffs Have Not Satisfied the Requirements of *Chrysler Corp. v. Dann*

Delaware courts long have been "concerned with discouraging baseless [shareholder] litigation." *Allied Artists Pictures Corp. v. Baron*, Del Supr., 413 A.2d 876, 879 (1980). As the Court observed in *Chrysler Corp. v. Dann*, Del. Supr., 223 A.2d 384, 386-387 (1966):

> * * * [T]he mere filing of a derivative action against a corporation will [not] justify the award of fees to plaintiff's counsel. Momentary reflection will demonstrate that to do so would encourage the filing of many such actions wholly lacking merit for the sole purpose of obtaining counsel fees.

The same concerns apply to shareholder class actions.

Chrysler Corp. v. Dann held that, to guard against the danger that the prospect of a fee award would encourage the filing of a baseless claim, a plaintiff's attorney must meet a *two-part* test. First, he must demonstrate that the action (or the settlement) confers some benefit upon the corporation or the class. Second, he must show that the action, when filed, was *meritorious*. *Id.* at 387. The Court explained the second element of this test as follows:

> A claim is meritorious within the meaning of the rule [**1.**] if it can withstand a motion to dismiss on the pleadings [and **2.**] *if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success.*

Id. (emphasis added); *see also Allied Artists Pictures Corp. v. Baron, supra*, 413 A.2d at 879 .

The record in this Action makes clear that, at the time plaintiffs' attorneys initially filed complaints, they did *not* "possess[] knowledge of provable facts which h[e]ld out some reasonable likelihood of ultimate success."

First, as pointed out above, it is well established as a matter of Delaware law that a SNC comprised of independent directors will be deemed to have at least the capacity to protect the interests of minority shareholders when a cash-out merger is proposed. It also is beyond dispute that CEI, when it made an offer to cash out the public shareholders of CCI, stated that its offer was subject to the approval by a "special committee of independent directors" to be appointed by the CCI board. Yet the first two complaints, filed by firms that eventually became members of plaintiffs' Executive Committee, totally ignored the fact that CEI had made its offer subject to approval by a SNC. The complaints initially filed by two other members of plaintiffs' Executive Committee did acknowledge that fact, but failed to allege a single fact sufficient to call into question the independence of the three directors who were not part of management and were not affiliated with CEI. The only reasonable inference from this failure is that, at the times these complaints were filed, plaintiffs did *not* possess knowledge of provable facts that held out some

reasonable likelihood of ultimate succcss on the merits.

Second, none of the plaintiffs could have possessed knowledge of provable facts that held out a reasonable likelihood of ultimate success at the times they filed their complaints because no plaintiff could have known, at those times, to what terms, if any, the SNC (and CCI's full board of directors) would agree. Moreover, because CEI explicitly made its offer subject to approval by a SNC, there was no basis on which any plaintiff reasonably could have anticipated that CEI would proceed with its offer without securing the consent of the SNC.

In short, plaintiffs' attorneys have not demonstrated, and cannot demonstrate, that their claims were meritorious when filed. Consequently, *Chrysler Corp. v. Dann* requires that this Court deny their petition for a fee award.

C. In Any Event, the Record Does Not Support a Fee Award of $4,950,000

Plaintiffs' attorneys have stated that they will request an enormous fee — $4,950,000. Taken together with the anticipated fee request in the Georgia action, the attorneys representing CCI's public shareholders are requesting total fees of $6,200,000. The record in this case clearly does not support a total fee award of anywhere near that amount.

We anticipate that plaintiffs' attorneys will argue that in light of the increased consideration received by CCI's public shareholders, the fee they request is quite modest. But the mere fact that plaintiffs' unjustified claims were filed with respect to a very large transaction should not, by itself, justify providing plaintiffs' attorneys with a windfall.

Neither should CEI's acknowledgment "the efforts of plaintiffs' counsel . . . were causal factors that led to (i) the increased consideration offered to CCI minority shareholders . . . and (ii) the Majority of the Minority condition." In assessing that concession, we urge the Court to take account of two related considerations. First, as set forth above, the record in these Actions

strongly suggests that the efforts of plaintiffs' attorneys were, at best, a very minor factor in producing the benefits that CEI mentions. The SNC and its advisers appear to have done all the "heavy lifting" with respect to both the increase in consideration and the majority of the minority condition.

Second, concessions such as that made by CEI have become a *pro forma* feature of the litigation process. As pointed out in *File Early, Then Free Ride*, they are routinely made in every case in which plaintiffs' attorneys agree to sign off on a deal approved by a SNC. Thus, this Court should not give CEI's concession much weight.

Before awarding plaintiffs' attorneys anything approaching the enormous fee that they have requested, we urge this Court to require plaintiffs' attorneys to demonstrate — perhaps in an evidentiary hearing — exactly how their efforts, as opposed to the efforts of the SNC and its advisers, caused CEI to increase the price it was prepared to pay and to agree to the majority of the minority condition.

D. Plaintiffs' Attorneys Did Not Bear Any Significant Contingency Risk

Objectors also anticipate that plaintiffs' attorneys will claim a large fee award is justified because of the significant contingency risk that they bore. The history of class actions such as this, detailed in the White Affidavit and in *File Early, Then Free Ride*, demonstrates that plaintiffs' attorneys who file merger-related class actions in Delaware rarely emerge empty-handed from an action to which they devote any substantial effort.

More significantly, the record in this Action belies any such claim. It seems most unlikely that so many highly experienced plaintiffs' attorneys would have filed complaints, battled to be named lead counsel, and sought membership on plaintiffs' Executive Committee if they thought there was a significant risk that they would not be paid. Given the history of similar actions and

the amount involved in the proposed transaction, it seems much more likely that they saw this case as a likely source of a large fee.

We urge this Court to disappoint those expectations. Should the Court determine that some fee award is warranted, we urge it not to give any weight to claims by plaintiffs' attorneys that they bore significant contingency risks. Rather, the Court should carefully review the hours that plaintiffs' attorneys claim to have devoted to this case, in order to ensure that they are not compensated for time devoted to maneuvering to be named to lead plaintiff or for duplicative efforts required by the cumbersome management structure that they elected to adopt. Then, the Court should award them, at most, a reasonable hourly fee for such hours as they devoted to actually protecting the interests of the plaintiff class.

CONCLUSION

Objectors take no position on whether this Court should approve the proposed Settlement. Objectors urge this Court to deny plaintiffs' attorneys' petition for a fee award of $4,950,000. In the alternative, Objectors urge this Court to award plaintiffs' attorneys no more than a very small portion of the enormous fee they have requested.

ASHBY & GEDDES

/s/ Stephen E. Jenkins (ID #2152)

Stephen E. Jenkins (ID #2152)
222 Delaware Avenue
P.O. Box 1150
Wilmington, DE 19899
(302) 654-1888
Attorneys for Objectors Jeffrey Zouh
And Franklin Mutual Advisors LLC

ELLIOTT J. WEISS
Charles E. Ares Professor
James E. Rogers College of Law
University of Arizona
1201 E. Speedway Blvd.
Tucson, AZ 85721
(520) 621-3578

Dated: January 13, 2005
152125.1

EFiled: Jan 13 2005 4:01PM EST
Filing ID 4943034

Franklin Mutual Advisors, LLC ("FMA") is a limited liability company organized under the laws of Delaware. Its principal p
business is 51 John F. Kennedy Parkway, Short Hills, NJ 07078. Investment advisory agreements with a number of publicly
investment companies grant FMA sole investment and voting power over securities beneficially owned by FMA's advisory c
FMA purchased on behalf of a number of its advisory client funds shares of Cox Communication Class A common stock as
in the table below. All shares were tendered into the merger in December 2004.

Purchase Date	Mutual Shares Fund[1]	Mutual Qualified Fund[1]	Mutual Beacon Fund[1]	Mutual Discovery Fund[1]	Mutual Shares Securities Fund[2]	Mutual Discovery Securities Fund[2]	Franklin Mutual Recovery Fund[3]	Franklin Mutual Shares Fund[4]	Franklin Mutual Beacon Fund[5]	Mutual Beacon Fund[6]	Mutual Discovery Fund[6]
08/26/04	18,200	6,800	8,700	8,200	3,900	700	200	100	2,500	600	100
08/31/04	36,600	13,600	17,600	16,800	7,600	1,400	400		4,800	1,000	200
09/03/04	9,200	3,400	4,400	4,200	1,900	300	100		1,200	300	
09/14/04	9,000	3,400	4,400	4,200	1,900	300	100		1,300	300	100
09/17/04	36,200	13,600	17,400	16,600	7,800	1,400	400	200	5,000	1,200	200
09/17/04							33,600				
09/20/04	9,100	3,400	4,300	4,200	1,900	300	100		1,300	300	100
09/21/04	9,100	3,400	4,300	4,200	1,900	300	100		1,300	300	100
09/22/04	18,200	6,800	8,600	8,400	3,800	600	200		2,600	600	200
09/23/04	9,100	3,400	4,300	4,200	1,900	300	100		1,300	300	100
09/24/04	100	100	100	100							
10/01/04	9,100	3,400	4,300	4,200	1,900	300	100		1,300	300	100
10/07/04	9,100	3,400	4,300	4,200	1,900	300	100		1,300	300	100
	173,000	64,700	82,700	79,500	36,400	6,200	35,500	300	23,900	5,500	1,300

[1] One of the series comprising FRANKLIN MUTUAL SERIES FUND INC., a Maryland corporation registered as an investment
company under the Investment Company Act of 1940.

[2] One of the portfolios comprising FRANKLIN TEMPLETON VARIABLE INSURANCE PRODUCTS TRUST, a Massachusetts
registered as an investment company under the Investment Company Act of 1940.

[3] A Delaware statutory trust registered as an investment company under the Investment Company Act of 1940.

[4] One of the funds comprising FRANKLIN TEMPLETON FUNDS, a UK umbrella open-end investment company (OIEC).

[5] One of the sub-funds comprising FRANKLIN TEMPLETON INVESTMENT FUNDS, a *société d'investissement à capital varia*
(SICAV) incorporated in Luxembourg.

[6] An Ontario (Canada) mutual fund trust.