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Matter of Allied Healthcare Shareholder Litig.
2015 NY Slip Op 51552(U)
Decided on October 23, 2015
Supreme Court, New York County
Ramos, J.
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In the Matter of Allied Healthcare Shareholder Litigation.

652188/2011
Charles E. Ramos, J.

The parties have submitted their latest submission in support of their joint unopposed motion for the entry of an order directing notice to the proposed class and scheduling a hearing on class certification and settlement.

This action arose out of a proposed merger between Allied Healthcare (Allied), Saga Group Limited (Saga), and

AHL Acquisition Corp (AHL). Pursuant to the merger, shareholders of Allied common stock would receive $3.90 in cash in exchange for each share of Allied.

As is typical when any sort of corporate merger or re-organization is proposed, a number of class actions were filed, alleging various breaches of fiduciary duty and seeking to compel additional disclosures to shareholders and to prevent closing of the merger. In this instance, five such actions were consolidated under this caption.

The consolidated complaint alleges that the sale price was inadequate, the process was flawed, there were provisions that prevented competing offers, that material information was not provided to shareholders and that the officers and directors of Allied, Saga and AHL had breached their fiduciary duties and/or aided and abetted those breaches. In short, the proposed merger is alleged to represents the worst possible deal for the proposed class of shareholders.

The proposed class counsel (class counsel) conducted three depositions and reviewed board minutes and other documents.

Class counsel then filed a motion seeking to have this Court grant a preliminary injunction to bar the merger but withdrew the motion and the merger was concluded.

Prior to the closing of the merger and pursuant to an agreement with class counsel, the defendants included a supplement to the proxy which contained additional disclosures. All of the terms of the merger offer remained completely unchanged. Shortly thereafter, the shareholders voted to approve the merger and the merger closed on October 20, 2011.

Not one of the additional disclosures the defendants included in the supplement to the proxy at class counsels' urging could be characterized as significant nor would the failure to make any of the additional disclosures have resulted in this Court issuing a preliminary injunction to prevent or delay the merger.

The settlement agreement submitted to us now for this Court's approval provides that the defendants are to receive releases of all claims relating to the merger, from all shareholders, whether they were plaintiffs or not, and the plaintiffs' attorneys are to receive, if approved by this Court, an un-opposed (in reality, an agreed upon) legal fee of $375,000.

In the event any shareholder wishes to go to the trouble of [*2]opposing this settlement, there is a proposed complicated and time consuming procedure to either opt out of the settlement or to object. As an example of the effort a potentially objecting shareholder would be put to, if that shareholder wishes to merely examine the settlement agreement drafted by his/her own attorney (class counsel), that shareholder must travel, at the shareholder's expense, to the Courthouse at 60 Centre Street, New York, NY and, acting without aid of counsel, attempt to inspect the proposed agreement held by the Clerk of this Court.

Unfortunately, what is described above is typical of the treatment afforded shareholders in the event of a class action settlement *(See*, *City Trading Fund v Nye*, 46 Misc 3d 1206[A] 2015 [Sup Ct, NY County 2015; *Gordon v Verizon Communications, Inc.*, 2014 NY Slip Op 33367[U][Sup Ct, NY County).In summary, this proposed settlement offers nothing to the shareholders except that attorneys they did not hire will receive a $375,000 fee and the corporate officers who were accused of wrongdoing, will receive general releases. Presumably, the releases would release, not only the alleged wrongdoing, but also the act of the payment of the attorney fees to class counsel.

"What did counsel do to earn this fee?" might well the shareholders ask this Court before we approve this settlement.

In virtually every other area of law, there is some risk. No attorney should expect to be paid for losing or obtaining a meaningless settlement. In most civil litigation, if one party wins, the other losses. If a person is injured, there is no guaranty of a recovery or of a legal fee unless the injured party prevails. There is no justification to reward an attorney for losing a case. And, typically, a legal fee bears some relationship to the result. A large result will earn a large fee. Ultimately, the degree of a plaintiff's success is the most critical factor in determining the reasonableness of the fee award (*Schmacher v Neostem, Inc.,* 43 Misc 3d 1233[A], Sup Ct, NY County 2014 Ramos, J.).

However, in the area of derivative litigation, a culture has developed that results in cases of relatively worthless settlements (derivative actions are rarely tried to a verdict) that discontinue the action (with releases) resulting in the corporate defendants not opposing an agreed upon legal fee to class counsel. The rationale for this practice of rewarding plaintiffs' counsel without any meaningful recovery is that even unsuccessful derivative litigation serves a societal purpose. That merely bringing on derivative litigation that seeks to examine the doings of corporate America has a prophylactic effect discouraging malfeasance. Horse-hockey.

If this was the standard, then all unsuccessful attorneys should be likewise compensated because, as examples, the motoring public would drive more carefully, doctors would avoid malpractice, spouses would not cheat and Wall Street would not have to be "Occupied."

Putting aside any concerns of collusion, (and there are many) *(See* Howard M. Erickson, The Problem of Settlement Class [*3]actions, 82 Geo Wash Law Rev 951[2014]; John C. Coffee Jr., The Corruption of the Class Action, Wall St. J., [1994]),this practice of compensating class counsel no matter how meaningless the result is, creates the impression with most objective observers that these actions are brought merely for the purpose of generating legal fees. In addition, the named plaintiffs in many of these settled class actions, typically own only a handful of shares and often seek additional compensation for their "services," which are usually illusory.

The willingness to rubber stamp class action settlements reflects poorly on the profession and on those courts that, from time to time, have approved these settlements.

Our profession does serve society, but settlements like these (which do require court approval) make it appear that society is being "served up" as if society was an item on a menu! These settlements are all too often entered into because the corporate officers are faced with the dilemma of protracted costly litigation versus a quick, relatively cheap settlement that releases the corporate officers and compensates class counsel with someone else's money (the shareholders).

The settlement in this matter is not worthy of any further consideration. The parties may file a stipulation of discontinuance or prepare this matter for a trial or a dispositive motion.

This shall constitute the decision and order of this Court.

Dated: October 23, 2015________________________J.S.C.

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