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FROM: **David J. Beck, Esq.**

DATE: **July 18, 2007**

MESSAGE:
Please see attached.

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July 18, 2007

Re: *Wood, et al. v. John M. O'Quinn, PC, et al.*

Via Facsimile

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Gentlemen:

Enclosed are the following rulings issued today:

1. Order Addressing Phase II and III Issues;
2. Concurring / Dissenting Opinion of Arbitrator Tekell; and
3. Order Denying Motion to Decertify.

Very truly yours,

David J. Beck
For the Panel

DJB/rct
Enclosure

cc: Ronald D. Krist, Esq. ***Via Facsimile***
William Fred Hagans, Esq. ***Via Facsimile***
Terry L. Scarborough, Esq. ***Via Facsimile***
Clay Wilder, Esq. ***Via Facsimile***

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IN THE MATTER OF THE ARBITRATION BETWEEN:	§	
MARTHA WOOD, ET AL.,	§	PURSUANT TO THE RULES OF THE
Plaintiffs,	§	
v.	§	AMERICAN ARBITRATION ASSOCIATION
JOHN M. O'QUINN, PC d/b/a O'QUINN & LAMINACK, ET AL.,	§	
Defendants.	§	

ORDER ADDRESSING PHASE II AND III ISSUES

On February 6, 2006, a Majority of the Panel entered an order certifying a class in this proceeding. In addition to addressing issues of class certification, the Order also set forth a plan for resolving the merits of the dispute through three phased hearings.

The first hearing on the merits was held on January 23-24, 2006. The purpose of the hearing was to determine (1) whether the subject Fee Agreements allow Defendants John M. O'Quinn P.C. d/b/a O'Quinn & Laminack, *et al.* (collectively "O'Quinn") to deduct general or common expenses; and (2) the appropriateness of the expenses deducted by O'Quinn. Following the hearing, a Majority of the Panel issued an order on March 6, 2006 concluding that (1) the Fee Agreements do not allow for the deduction of BI General Expenses; (2) certain of the BI General Expenses charged to the Class Members (defined as "Class" in the Class Determination Award and excluding those individuals who have validly opted out) were inappropriate; and (3) O'Quinn's actions were not authorized by the Fee Agreements.

The second hearing on the merits was held on March 12-13, 2007. The purpose of this hearing was to (1) determine the validity of O'Quinn's affirmative defenses; and (2) if any

liability was found to exist on the part of O'Quinn, determine an appropriate remedy.[1] After considering the parties' respective arguments, evidence introduced at the hearing, and applicable law, we enter the following Order on these remaining issues.

A. CONTINGENCY FEE AGREEMENTS

1. Purpose of Contingency Fees

The Panel recognizes at the outset the important role that contingency fee agreements play in our society. Contingency fee contracts serve two main purposes. *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). First, they allow aggrieved citizens who cannot afford to pay a lawyer at the outset of or during the legal representation to compensate their lawyer out of any future recovery. *Id.* Second, because contingent fees offer the potential of a greater fee than might be earned under an hourly billing method, they compensate the attorney for the risk that the attorney will receive no fee at all if the case is lost. *Id.* Under such a typical agreement, the lawyer in effect lends the value of his services and advances the expenses of the litigation, both of which are secured by a share in the client's potential recovery. *Id.* Without contingency fees, the doors of justice would likely be closed to many indigent and economically less fortunate persons and, in that event, they would be denied their day in court.

2. Strict Requirements for Contingency Fees

Because contingency fee arrangements were originally permitted for the benefit of the indigent and those economically less fortunate, and those persons are more likely to be unsophisticated in legal matters, strict rules were designed to protect clients from misunderstandings concerning the terms, financial and otherwise, of the attorney-client

[1] Because of scheduling difficulties on the part of the parties and arbitrators, the Phase II and III issues by agreement were combined into a single hearing.

relationship and to prevent overreaching by their attorneys. In Texas, contingency fee agreements must be in writing and state the method by which any fee will be determined. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9). Moreover, the written fee agreement must "state the litigation and other expenses to be deducted from the recovery . . .." *Id.* Finally, when a contingency fee matter is concluded, the lawyer must provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. *Id.* The Panel firmly believes that a strict application of these rules is important and necessary to protect clients, while at the same time ensuring that lawyers are fairly compensated for the risk they have taken. These rules are clear and precise.

B. PHASE II ISSUES—O'QUINN'S AFFIRMATIVE DEFENSES

1. Elements of O'Quinn's Affirmative Defenses

O'Quinn argues that the affirmative defenses of ratification, quasi-estoppel and quantum meruit defeat the claims asserted by the Class Members herein. The elements of these affirmative defenses are as follows:

a. Quasi-Estoppel

Quasi-estoppel precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken. *See Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. *See id.*

b. Ratification

Ratification occurs when a party, with knowledge of material facts, approves an earlier act of another with the intention of giving it validity. *See K.B. v. N.B.*, 811 S.W.2d 634, 638 (Tex. App.—San Antonio 1991, writ denied).

c. Quantum Meruit

To recover under quantum meruit, a plaintiff must show that: (1) he rendered valuable services or furnished materials; (2) for the person sought to be charged; (3) such services and materials were accepted, used and enjoyed by the person sought to be charged; and (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged. *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990); *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

2. Requirement of Knowledge of All Material Facts

The defenses of estoppel and ratification require that a plaintiff know *all* material facts. *See Rourke v. Garza*, 530 S.W.2d 794, 803 (Tex. 1975) ("It is essential to the application of the doctrine of estoppel that the person claimed to be estopped have had knowledge of all material facts at the time of the conduct alleged to constitute the basis of the estoppel."); *Frazier v. Wynn*, 472 S.W.2d 750, 753 (Tex. 1971) ("[T]here can be no ratification or estoppel from acceptance of the benefits by a person who did not have knowledge of all material facts."); *Leonard v. Hare*, 336 S.W.2d 619, 621 (Tex. 1960) (holding that injured employee's actions in accepting, endorsing, and cashing weekly payments from employer's voluntary compensation policy (instead of electing to pursue common law damages) did not constitute ratification because actions did not establish "that at the time of accepting this compensation [the employee] was in possession of or acquainted with all facts or that as a matter of law he knew his rights and privileges to accept or reject benefits under voluntary compensation policy or to sue his

employer at common law . . .."); *Reyes v. Storage & Processors, Inc.*, 86 S.W.3d 344, 351 (Tex.App.—Texarkana 2002), *aff'd by Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004) (holding that proof of ratification was insufficient because "[the defendants] have failed to show any evidence that at the time [the plaintiff] accepted plan benefits, he did so with the knowledge he had common-law rights that he would waive by accepting such benefits" and that "estoppel fails for the same lack of knowledge on [the plaintiff's] part.").

There is certainly evidence in the record that the Class Members were informed at the conclusion of their respective lawsuits (and that some Class Members were informed before they signed their Fee Agreement and during the pendency of their lawsuits) that BI General Expenses were being deducted from their respective settlements and what these expenses were. *See, e.g.*, Class Hearing Tr. Vol. I, 32:14-32:16, 82:2-82:6 (Laminack); Class Hearing Tr. Vol. II, 103:1-103:10 (Pirtle); Class Hearing Tr. Vol. II, 101:17-122:1 (Laminack); Defs' Ex. 8; Defs' Ex. 46. There is also evidence that many Fee Agreements were executed *before* the BI General Expense category was even created by O'Quinn, Class Hearing Tr., Vol. II, 14:18-17:23 (Laminack Testimony); Phase I Hearing Tr. Vol. II, 152:15-152:18 (Enoch Testimony). Yet, O'Quinn has consistently maintained that the Fee Agreements *always* allowed for the deduction of BI General Expenses because the Fee Agreement signed by each Class Member provided that "Client additionally agrees that Attorneys are to be repaid and reimbursed out of Client's recovery for all court costs and expenses of litigation Attorney had paid or incurred." Defs' Ex. 1, § 6. As a result, the Class Members were never informed that the Fee Agreements *did not* (or even might not) allow for the deduction of BI General Expenses, *i.e.*, a portion of the litigation expenses attributable to O'Quinn's other breast implant clients. *See, e.g.*, O'Quinn's Brief on Affirmative Defenses, p. 3 ("the O'Quinn Defendants never informed its client that the contract did not allow the charge"). Since it is undisputed that the Class Members were not informed of this critical and material fact, there can be no estoppel or ratification.

3. Quantum Meruit Defense

"Generally, a party may recover under quantum meruit **only when** there is no express contract covering the services or materials furnished." *Vortt Exploration Co., Inc.*, 787 S.W.2d at 944 (emphasis added); *see also Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988). Here, there were express contracts—the Fee Agreements—covering the services and materials furnished by O'Quinn to the Class Members. The exceptions to this general rule arise when (1) a plaintiff has partially performed an express contract but, because of the defendant's breach, is prevented from completing the contract; and (2) a plaintiff partially performs an express contract that is unilateral in nature. *Truly*, 744 S.W.2d at 936-37. Neither of these situations exists here. Thus, O'Quinn's defense of quantum meruit fails as well.

4. O'Quinn's Conduct Bars Equitable Defenses

Ratification, quasi-estoppel and quantum meruit are all equitable defenses. *See Truly*, 744 S.W.2d at 938 (recovery in quantum meruit is based on equity); *Texas Enters., Inc. v. Arnold Oil Co.*, 59 S.W.3d 244, 249 (Tex.App.—San Antonio 2001, no pet.) (estoppel is an equitable defense); *ANCO Ins. Servs. of Houston, Inc. v. Romero*, 27 S.W.3d 1, 6 (Tex.App.—San Antonio 2000, pet. denied) (same); *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 736 (Tex.App.—Corpus Christi 1994, writ denied) (waiver and ratification are equitable doctrines).

The Panel concludes that O'Quinn's conduct in this case is such that the equitable defenses asserted are unavailable. *See Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 27 (Tex. App.—Tyler 2000, pet. denied) (finding that trial court did not err by denying attorneys equitable set-aside of fraudulent transfer by their client because jury had found attorneys breached their fiduciary duties to client); *Steves v. United Servs. Auto. Assoc.*, 459 S.W.2d 930, 934 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.) (holding that trustee who violated fiduciary duties could not invoke equity to seek specific performance).

C. PHASE III ISSUES—APPROPRIATE REMEDY

As noted, a Majority of the Panel previously decided that (1) the Fee Agreements do not allow for the deduction of BI General Expenses; (2) certain of the BI General Expenses charged to the Class Members were inappropriate; and (3) O'Quinn's actions were not authorized by the Fee Agreements. Since we have now concluded that O'Quinn's affirmative defenses fail, we must now determine an appropriate remedy.

1. Breach of Contract

a. Actual Damages

In connection with the Majority's earlier decision (Phase I) that the Fee Agreements do not allow for the deduction of BI General Expenses,[2] a Majority of the Panel concludes that an appropriate remedy is the return by O'Quinn of all BI General Expenses improperly deducted from the Class Members' settlement distributions.

The evidence shows that a total of $19,828,414 was deducted as BI General Expenses from the settlement distributions made to the Class (as defined in the Class Determination Award) and that $1,917,685.20[3] of that amount has since been refunded by O'Quinn. Defs' Ex. 70; Phase III Hearing Tr. V. II, 324:2-325:11. That leaves a total of $17,910,728 outstanding.

Since the Fee Agreements provide for the calculation of attorneys' fees *after* expenses have been deducted, *see* Defs' Ex. 1, §§ 2, 6, O'Quinn would have been entitled to 40% of that amount—$7,164,291.20—had it not been deducted. This means that a total of $10,746,436.80 has been improperly deducted and remains outstanding from the Class' settlement distributions.

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[2] Although Arbitrator Soussan dissented from the finding of a breach of contract for the reasons stated in her Dissent (Phase One), she agrees with the Majority that if a breach of contract has occurred, the damages which flow therefrom would be as set forth in this Opinion.

[3] This is the amount of principal that was refunded in early 2007. The actual amount of the refund was higher—$2,206,736—because it included interest. Defs' Ex. 70.

One complicating factor is that 30 individuals elected to "opt out" of the Class. A Majority of the Panel finds that O'Quinn should repay the Class Members the portion of the $10,746,436.80 that was withheld from them (excluding the amount withheld from the "opt outs").

Concluding that the breach of contract damages should be less, the Dissent states that "Plaintiff lawyers have been struggling for years as to how to handle general expenses in a mass tort case." Dissenting Op. at 1. No one doubts that, as the Majority has hereinafter recognized. But the sweeping conclusions recited by the Dissent have no basis in the record before the Panel. Simply stated, we do not have before us the "[t]housands of fee agreements that do not address the general common expenses [that] are floating around this state." Id. at 2. Nor do we have before us any potential dispute between a client and an attorney in any of these referenced "other" cases. The terms of attorneys' fees contracts other lawyers *might* have, the specific financial arrangements they *might* have entered into with their client, or the particular circumstances involved in these "other cases" cannot reasonably or legally serve as a basis for reducing the breach of contract damages sustained in this case under the circumstances presented to us.

b. Pre-Judgment Interest

The Panel also believes that the return of the BI General Expenses improperly deducted from the Class Members' settlements should include interest. O'Quinn has previously recognized the validity of this position because the Firm's recent refund to the Class included interest. *See* Defs' Ex. 70.

A Majority of the Panel therefore finds that O'Quinn should pay the Class Members interest on the amount to be awarded under paragraph C(1)(a) above and that such interest shall be calculated at the same rate and in the same manner as was done by O'Quinn in connection with the recent refund (as reflected in Defs' Ex. 70).

c. Attorneys' Fees

The general rule is that a party may not recover attorney's fees unless such recovery is authorized by statute or provided for by contract between the parties. *Travelers Indem. Co. of Connecticut v. Mayfield*, 923 S.W.2d 590, 593 (Tex. 1996). Chapter 38 of the Texas Civil Practice & Remedies Code allows for the recovery of "reasonable attorney's fees" in connection with claims involving an oral or written contract. *See* TEX. CIV. PRAC. & REM. CODE § 38.001 (Vernon 1997). Indeed, if the required elements are proven, an award of attorney's fees for breach of contract is mandatory, not discretionary. *See Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998).

To recover attorney's fees under Section 38.001, a party must (1) prevail on a cause of action for which attorneys' fees are recoverable; and (2) recover damages. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). The prerequisites for recovery are that (1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the amount owed not have been tendered before the expiration of the 30th day after the claim is presented. TEX. CIV. PRAC. & REM. CODE § 38.002 (Vernon 1997); *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981).

Given the Panel's rulings, the Class Members have prevailed on their breach of contract claim and are entitled to damages. Additionally, there is no dispute that Plaintiffs are represented by counsel and that O'Quinn has never tendered either the amount the Majority of the Panel or the dissenting arbitrator has found to be currently due and owing to the Class Members. O'Quinn does dispute, however, that the Class Members properly presented their claim and that the fees requested are reasonable.

1. Presentment

"[S]ection 38.002 does not require any particular form of presentment; all that is necessary is that a party show that its assertion of a debt or claim and a request for compliance

was made to the opposing party, and the opposing party refused to pay the claim." *Standard Constructors, Inc. v. Chevron Chem. Co.*, 101 S.W.3d 619, 627 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *see also Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 719 (Tex. App.—Houston [1st Dist.] 1988, writ ref'd n.r.e.). Either oral or written demands are sufficient. *Jones*, 614 S.W.2d at 100. There is no requirement that the claim be presented 30 days prior to filing of the *suit*. *Palestine Water Well Servs. v. Vance Sand and Rock, Inc.*, 188 S.W.3d 321, 327 (Tex. App.—Tyler 2006, n.p.h.); *Stuckey v. White*, 647 S.W.2d 35, 38 (Tex. App.—Houston [1st Dist.] 1982, no writ). Rather, the presentment need only be made 30 days prior to *judgment*. *Mackey v. Mackey*, 721 S.W.2d 575, 579 (Tex. App.—Corpus Christi 1986, no writ).

There is evidence that Class Counsel made a demand on O'Quinn for payment of the amount of BI General Expenses that had been deducted from the Class' settlements during a meeting with representatives of the O'Quinn firm following suit being filed. *See* Phase II/III Hearing Tr. Vol. II, 512:3-512:20, 530:19-537:6 (Hagans). While the demand apparently did not reference a specific dollar amount, it provided the method for determining such amount and the information necessary to determine the amount was within O'Quinn's knowledge. *Id.* at 533:20-534:13, 535:1-535:7. The Panel finds this assertion of a claim and request for payment to be sufficient, particularly in light of the directive set out in Section 38.005 that "[t]his chapter shall be liberally construed to promote its underlying purpose." TEX. CIV. PRAC. & REM. CODE ANN. § 38.005 (Vernon 1997).

2. Reasonableness

The factors that should be considered when determining the reasonableness of a fee include (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results

obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Anderson & Co.*, 945 S.W.2d at 818. It is presumed that the usual and customary attorney's fees for a claim are reasonable. TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (Vernon 1997). Moreover, the Panel may take judicial notice of the usual and customary attorney's fees without receiving further evidence. *Id.* at § 38.004.

This case was first filed in 1999. Much has occurred during the intervening eight years. Issues dealing with whether the dispute was subject to arbitration and, once it was decided the case was arbitrable, who would decide class certification issues (a trial court or arbitration panel), occasioned multiple trips to the Tyler Court of Appeals and Texas Supreme Court. Before this Panel there has been briefing about whether the Fee Agreements allow for class arbitration; briefing, discovery and a hearing on class certification; and briefing, discovery and a hearing on the merits of the dispute. District and appellate court review of certain of the Panel's orders also has been sought. Class Counsel has estimated they expended in excess of 15,000 hours on the matter since inception. Phase II/III Hearing Tr. Vol. II, 508:13-509:22 (Hagans).

Class Counsel are working on this matter on a contingency basis. *Id.* at 516:17-517:25. Class Counsel have advanced the expenses for the lawsuit, and to date those expenses total in excess of $1 million. *Id.* at 511:14-512:2. While these expenses are in excess of $1 million, Class Counsel have indicated that they seek only the recovery of expenses in the range of $400,000 to $500,000. Phase II/III Hearing Tr. Vol. II, 511:14-511:19 (Hagans).

The Panel is personally familiar with counsel for both the Class Members and O'Quinn and both sets of lawyers possess the experience, ability and reputation of the highest order.

Moreover, both sets of lawyers have exhibited a great amount of skill in representing their respective clients and performing the legal services rendered in this case.

Plaintiffs' expert witness, the Honorable Robert Parker, has testified that in his opinion a percentage fee of 25% to 33% is reasonable for this case. Phase II/III Hearing Tr. Vol. I, 35:4-37:14 (Parker). The Panel also notes that O'Quinn charged the Class Members a 40% contingency fee in the underlying litigation. Defs' Ex. 1, § 2.

On the basis of the evidence before it, the Panel finds a 25% contingency fee to be reasonable in this instance. Once the calculation of BI General Expenses charged to the Class Members net of any interest is finalized, a Majority of the Panel will order O'Quinn to pay an amount equal to 25% of the damages awarded under paragraph (C)(1)(a) above to the Class Members as attorney's fees.

2. Breach of Fiduciary Duty

The BI General Expenses category was not created until 1993, so the Fee Agreements executed *before* that date did not expressly reference BI General Expenses. Nor did the Fee Agreements executed *after* the creation of the BI General Expenses category expressly reference such a unique expense, *i.e.*, each client would be responsible for a portion of the litigation expenses of all other O'Quinn breast implant litigation clients, even those expenses incurred after the client resolved her claim or lawsuit. Although the BI General Expense Account first had a surplus in 1995, and has had a continuous surplus since May 2000, the Class Members were never advised of the surplus until *after* the filing of this Lawsuit and no attempt was made to return the Class Members' money until January 2007 – almost seven years later. Class Hearing Tr. Vol. III, 221:15-221:23 (Ray Testimony); Phase I Hearing Tr. Vol. II, 88:22-89:10 (Spilker Testimony). The Class Members' portion of the surplus, including interest, $2,206,736, has now been returned to them.

According to O'Quinn, the firm had always intended to go back and audit BI General Expenses and remove any inappropriate charges at the conclusion of the breast implant litigation. *See* Class Hearing Tr. Vol. II, 39:16-40:22 (Laminack Testimony). Nevertheless, despite the existence of a surplus in the BI General Expense account since 2000, O'Quinn not only failed to perform such an audit until after the filing of this suit, but also O'Quinn never informed the Class Members that there even *was* a BI General Expense surplus. In addition, it is undisputed that money for the "Pro-Rata portion of BI General Exp's" was deducted from the Class Members' settlements, with no indication that it would ever be returned, and O'Quinn's own internal records identified certain clearly inappropriate expenses as items of BI General Expenses for which the Class Members were responsible. Defs' Ex. 53. Although the amounts withheld vary, these funds could potentially be very useful and important to these women. These actions by O'Quinn constitute a breach of the fiduciary duties owed to the Class Members. *See Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.) (attorney breaches fiduciary duty to client "when she benefits improperly from the attorney-client relationship by, among other things, subordinating the client's interest to his or her own, retaining the client's funds . . .."). These actions were a clear and serious violation of a lawyer's duty to his client.

The Dissent concedes that a violation of Disciplinary Rule 3.07 ("Trial Publicity") would "normally" not be a breach of fiduciary duty, Dissenting Op. at 4, but then says that O'Quinn's violation of that Rule is. The Preamble to the Disciplinary Rules, however, makes clear that a violation of *any* disciplinary rule does not give rise to a private right of action, breach of fiduciary duty or otherwise. E.g., *Jones v. Blume*, 196 S.W.3d 440, 449-50 (Tex. App. – Dallas 2006, pet. denied) (violation of Disciplinary Rules will not provide a cause of action for breach of fiduciary duty); see also, *Wright v. Sydow*, 173 S.W.3d 534 (Tex. App. – Houston [14th Dist.] 2004, pet. denied); *Judwin Properties, Inc. v. Griggs & Harrison*, 981 S.W.2d 868, 869-70 (Tex.

App. – Houston [1st Dist.] 1998, pet. denied). Our courts have consistently held that to be the law in Texas and, whether we like it or not, we as arbitrators are bound to follow that law.

In *Burrow v. Arce*, the Texas Supreme Court held that fee forfeiture is an appropriate remedy when an attorney commits a clear and serious breach of fiduciary duty to his client. 997 S.W.2d 229, 241 (Tex. 1999). The Court stated that a violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful. *Id.* The Court also identified the following (non-exclusive) factors for assessing the seriousness of the violation, and whether and to what extent forfeiture is appropriate:

1. the gravity and timing of the violation;
2. its willfulness;
3. its effect on the value of the lawyer's work for the client;
4. any other threatened or actual harm to the client;
5. the adequacy of other remedies; and
6. the public interest in maintaining the integrity of attorney-client relationships.

Id. at 243-44. But the Court made clear that forfeiture of fees is not automatic and may be partial or complete, depending on the circumstances presented. *Id.* at 241. We now apply the *Arce* guidelines to the circumstances presented here.

a. Gravity of Violation

As stated, the Panel believes O'Quinn's conduct is a clear and serious violation of the duties owed by a lawyer. As to the BI General Expenses withheld, even if the Panel accepts O'Quinn's contention that the firm *believed* the withholding of over $10 million of its client's money was authorized by the Fee Agreements, some BI General Expenses charged to the Class Members were plainly improper (*e.g.*, professional association dues, public relations, other

lawyer's fees, flowers, fundraising, office overhead). Moreover, the BI General expenses collected from the Class Members were not segregated and were instead used to pay down O'Quinn's BI litigation debt. Class Hearing Tr. Vol. II, 97:18-98:15 (Laminack); Phase II/III Hearing Tr. Vol. II, 421:19-421:22 (O'Quinn). And, as explained above, despite the fact that the BI General Expense account first had a surplus in 1995, and has had a continuous surplus since May 2000, the Class Members were not even advised of the surplus until *after* the filing of this lawsuit and no attempt was made to refund the Class Members' money until January 2007—almost seven years later. This conduct cannot be condoned.

b. Willfulness of Violation

The evidence is conflicting about whether O'Quinn's conduct was willful. The evidence outlined above raises serious questions about whether the improper withholding was willful. On the other hand, there is evidence that mass tort actions were relatively novel in the early 1990's when O'Quinn started representing the Class Members, and it appears that many law firms who normally represent plaintiffs were struggling with the same complex issues, including financing, presented by mass tort actions such as the breast implant litigation. *See, e.g.*, Class Hearing Tr. Vol. II, 14:12-21:14; Phase II/III Hearing Tr. Vol. II, 339:12-341:7 (Pirtle); Phase II/III Hearing Tr. Vol. I, 79:13-81:2, 102:2-102:25 (Blizzard). Thus, even if O'Quinn's conduct was willful, there appear to be some mitigating circumstances.

c. Effect of Violation on Lawyer's Work

The Panel does not believe that the withholding of BI General Expenses had any effect on the value of the work O'Quinn did for the Class Members. To the contrary, the evidence is that O'Quinn obtained extraordinary results for Plaintiffs. Phase II/III Hearing Tr. Vol. I, 90:15-91:13 (Blizzard). Moreover, even though not allowed by the Fee Agreements, the expenses charged to the Class Members were exceedingly low compared to what clients would have otherwise been charged, and were, for the most part, used for the benefit of the Class Members.

Phase II/III Hearing Tr. Vol. II, 356:21-357:1, 357:24-358:3, 360:8-360:17 (Pirtle); Oakley Dep., 67:17-67:25.

d. Any Other Threatened or Actual Harm to Client

Other than loss of the money that was improperly deducted and withheld from them, the Panel heard no evidence that O'Quinn's deduction of BI General expenses resulted in any other threatened or actual harm to the Class Members themselves.

e. Adequacy of Other Remedies

When considering the adequacy of other remedies, the Panel believes it important to remember that the main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. *Arce*, 997 S.W.2d 238. Rather, the central purpose of forfeiture is to protect relationships of trust by discouraging agents' disloyalty. *Id.* Accordingly, the Panel firmly believes that requiring a partial fee forfeiture in this case is necessary to encourage and underscore the critical objective of protecting the trust between an attorney and client.

f. Public Interest in Maintaining Integrity of Attorney-Client Relationships

Maintaining the integrity of the relationship between attorney and client is of the utmost importance. Quite simply, if O'Quinn is allowed to improperly withhold client funds with impunity, other lawyers may believe that they can do likewise. Such a result would destroy the very integrity of the special and unique relationship that exists between an attorney and client.

The evidence shows that the total attorney's fees made by O'Quinn in connection with the firm's representation of the Class is about $263.4 million. *See* Phase II/III Hearing Tr. Vol. II, 312:23-313:11, 314:16-315:20 (Spilker). Based on the evidence presented, including evidence that the Class Members may have actually benefited from the use of the BI General Expenses, and considered in light of the guidance provided by *Arce*, a Majority of the Panel finds

that in addition to the breach of contract damages set forth above, O'Quinn should forfeit $25 million of the fees made in connection with the firm's representation of the Class.

The Dissent asserts that the breach of contract damages assessed by the Majority of the Panel are too high and that its breach of fiduciary duty damages are too low. Dissenting Op. at 1. But the *total* amount assessed by the Majority (with the higher breach of contract damages, and the related pre-judgment interest and attorneys' fees necessarily rejected by the Dissent) are not substantially lower than the total amount contemplated by the Dissent.

g. Public Interest in Maintaining Integrity of Attorney-Client Relationships

1. Notice

O'Quinn has previously argued that the Panel cannot award attorneys' fees to Class Counsel without providing additional notice to the Class Members. The Panel respectfully disagrees. The original notice that was mailed out to the Class contained the following provision:

> **17. How will the lawyers be paid?**
>
> If Class Counsel gets money or benefits for the Class, they may ask the Arbitration Panel for fees and expenses. You won't have to pay these fees and expenses. If the Arbitration Panel grants Class Counsels' request, the fees and expenses would be either deducted from any money obtained for the Class or paid separately by O'Quinn.

The Panel believes that this language provided the Class Members with more than adequate notice that Class Counsel could seek recovery of their fees and expenses, and that such fees and expenses might be deducted from the Class Members' recovery.

2. Amount

For the same reasons already explained in Section C(1)(c)(2) above, the Panel concludes that Class Counsel is entitled to recover attorneys' fees equaling 25% of the total amount awarded to the Class Members for their breach of fiduciary duty cause of action. Class Counsel

shall also be entitled to recover as expenses $500,000 from the amount awarded to the Class Members. These attorney's fees and expenses are to be paid to Class Counsel from the amount awarded to the Class Members; these are not additional damages being assessed against O'Quinn.

E. FURTHER PROCEEDINGS

1. Within 5 days of the date of this Order, O'Quinn shall provide Class Counsel with the methodology by which the interest reflected in Defs' Ex. No. 70 was calculated.

2. Within 15 days of the date of this Order, Class Counsel shall submit a report to the Panel that contains the following information: (a) a list identifying each Class Member; (b) a list identifying each member of the Class that validly opted out; (c) the portion of the $10,746,436 improperly withheld by O'Quinn that is attributable to each remaining Class Member; (d) the amount of interest due on the portion of the $10,746,436 improperly withheld by O'Quinn that is attributable to the remaining Class Members (assuming that interest is calculated at the same rate and in the same manner as was done by O'Quinn in connection with the recent refund); and (e) a list identifying each Class Member and showing, on a percentage basis, the portion of the $10,746,436 improperly withheld that is attributable to each Class Member.

3. It is the Panel's understanding that all of the Class Members' Fee Agreements were with John M. O'Quinn, P.C. and that all of the fees and expenses paid by the Class Members were paid to either John M. O'Quinn, P.C. or John M. O'Quinn & Associates, L.L.P. The evidence has shown that John M. O'Quinn, P.C., John M. O'Quinn & Associates, and John M. O'Quinn & Associates, L.L.P. are the same entity. More specifically, O'Quinn originally operated as John M. O'Quinn, P.C., but in or around November 1999 that entity was converted to John M. O'Quinn & Associates, which was thereafter converted to John M. O'Quinn & Associates, L.L.P. Thus, in light of Section 10.106 of the Business Organizations Code, which

provides that "all liabilities and obligations of the converting entity continue to be liabilities and obligations of the converted entity in the new organizational form without impairment or diminution because of the conversion," the Final Award will be against these three entities, jointly and severally.

4. Within 15 days of the date of this Order, Class Counsel shall submit a brief suggesting how, and explaining the basis for such suggestion, the fee being forfeited by O'Quinn should be distributed to the Class Members.

5. Within 15 days of the date of this Order, Class Counsel shall submit a proposed Final Award.

6. O'Quinn shall file a response to Class Counsel's submissions within 15 days of receiving same.

7. All of the foregoing submissions shall be made in both paper and electronic form and shall be limited to the issues identified.

8. Following receipt of the filings set forth above, the Panel will issue a Final Award encapsulating all issues decided during this proceeding.

SIGNED AND ENTERED this 18th day of July, 2007.

David J. Beck

* Susan S. Soussan

Susan S. Soussan

*signed with permission by David J. Beck

IN THE MATTER OF THE ARBITRATION BETWEEN:	§	
MARTHA WOOD, ET AL.,	§	PURSUANT TO THE RULES OF THE
Plaintiffs,	§	
v.	§	AMERICAN ARBITRATION ASSOCIATION
JOHN M. O'QUINN, PC d/b/a O'QUINN & LAMINACK, ET AL.,	§	
Defendants.	§	

CONCURRING/DISSENTING IN PART OPINION

I respectfully file this Concurring/Dissenting In Part Opinion.

I continue to agree with the majority opinion that the defendant O'Quinn breached his contingency fee contract with all class members, but I disagree as to the amount of damages flowing from the breach of contract to all class members. I agree with the majority opinion that there was a breach of fiduciary duty by O'Quinn, but I also find additional breaches not found by the majority. I concur with the rest of the majority opinion, with the exception of the total amount of fee forfeiture assessed by the majority panel members.

C - Phase 3 Issues - Appropriate Remedies

A. Breach of Contract

I agree that O'Quinn breached his contingency fee contract with all class members. We have previously determined that the fee agreements with his clients did not allow for the deduction of BI general expenses. I agree that the appropriate remedy is damages resulting from the breach. I do not

believe that actual damages assessed against O'Quinn should be the full amount of the breast implant general expenses. The total BI general expenses withheld is correctly calculated in the majority opinion at $10,746,436.80. Plaintiffs' expert former Supreme Court Judge Craig Enoch testified that the legal theory of "benefit of the bargain" relieves O'Quinn from any damages. An enormous amount of work was put into the prosecution of these cases by the O'Quinn firm. The breast implant clients received a substantial "benefit" derived from the contracts entered into with O'Quinn. It is my opinion that damages resulting from the breach of the contract is $6,000,000 rather than the entire $10,746,436.80 paid into the general breast implant expense fund by the clients.

I believe that Plaintiff expert Enoch misplaces the "benefit of the bargain" application running in favor of O'Quinn. Benefit of the bargain is only available as a remedy that might run in favor of the non-breaching party to a contract. (*Qaddura*, 141 S.W.3d at 889; *Coon v. Schoeneman*, 476 S.W.2d 439, 441 (Tex. Civ. App.-Dallas 1972, writ ref'd n.r.e.). O'Quinn breached the contract in this case, and therefore I believe that the legal doctrine of benefit of the bargain does not apply as stated above. However, we can as arbitrators in this case apply a "doctrine of equity" that in my opinion requires me to reduce the damages from the total breast implant expenses to only $6,000,000. My analysis "why" the $6,000,000 will be addressed in a later paragraph.

Plaintiff lawyers have been struggling for years as to how to handle general expenses in a mass tort case. Many of the expenses are common to each of the clients. All of the clients benefit from general case liability and scientific/medical depositions and various company depositions taken for all clients. As a result, it is necessary to set up a general expense fund, in addition to the individual case expenses that are unique to each individual plaintiff. The O'Quinn firm attempted to come up with an equitable method for handling the general expenses.

The O'Quinn model for dealing with general expenses was the withholding of 1.5% from every plaintiff settlement. The 1.5% was placed in a general expense fund, hereinafter described by me as the "fund". Out of the "fund", O'Quinn paid general expenses. The clients were not technically "charged" the 1.5%, nor were they "charged" for each and every general expense on the general expense ledger as dollars were removed to pay general expenses. The model was calculated to come as close as possible to cover all general expenses, with the goal of having very little overage, and very little underfunding. In the mid 1990's a surplus was building in the "fund". Defendant testimony was that this surplus was intended to be refunded to all plaintiffs in the future. Not until that time would there be an actual "charging" of the expenses to the individual plaintiffs.

O'Quinn's model for handling general expenses was very close to perfect. We have found that O'Quinn breached the contracts with the clients because the general expense issue should have been addressed in the written fee contracts with the clients. An excellent analysis of our reasoning on this point is found in the majority opinion.

Thousands of fee agreements that do not address the general common expenses are floating around this state subject to criticism and attack. (Arbitration transcript Vol II, Pgs. 361-362). Those attorneys that have entered into these fee agreements are vulnerable to being forced to lose all general expenses if the majority opinion is expressly followed. Under the majority opinion all of these general expenses would be found as damages without consideration of the benefits received by plaintiff from the contract and without consideration of the professional and ethical handling of the client's expense money. But for the absence of the general expense issues in clients' fee agreements, thousands of clients have been dealt with fairly, honestly, and treated with the utmost loyalty and care by their lawyers.

The success of the O'Quinn firm in obtaining outstanding results for their clients is not questioned by this panel. However, the failure to address general fee expenses in the fee contracts results in our finding of breach of contract. The amount of damages we assess against O'Quinn in this case, and others might assess against attorneys in other cases, should be determined by an equitable analysis of the benefits received by the plaintiffs and the conduct of all attorneys in the handling of the legal matters for the clients. It is my opinion that damages for all expenses resulting from our finding of a breach of contract is too harsh in this case, and in like cases that might be scrutinized as a result of our findings in this case. I believe that there are probably many situations existing in which the finding of a breach of contract would, could, and should result in no damages being assessed against the lawyers. Unfortunately, in this case, actions on the part of O'Quinn keep me from finding "no damages". As I have stated, I find damages to be in the amount of $6,000,000 resulting from the breach of contract. This amount for damages closely parallels the amount of money taken from the "fund" to pay for a PR campaign and the Baylor study discussed below. In my opinion neither the PR campaign nor the Baylor study should have been paid out of the "fund".

Breach of Fiduciary Duty

1. GENERAL EXPENSE FUND SURPLUS

The majority opinion addresses the general expense fund surplus issue in more detail than I. I agree with the majority's analysis.

It is O'Quinn's position that surplus money set aside to pay general expenses was going to be returned to the clients at a time in the future. In excess of $3,000,000 was being held by the firm at the beginning of and during a substantial phase of the arbitration process. When an accounting of general expenses during the arbitration revealed that a surplus was being held by the firm, the firm

immediately took the position that the intent was always to return this money. Points of evidence below lead me to believe the contrary:

1. O'Quinn did not have a system by which addresses of clients were kept in order to facilitate the return of client money.

2. No effort had been made to inform the clients that there was a surplus.

3. No attempt to return the surplus to the clients until well into the arbitration hearing when decisions were being made by our panel.

All panel members have determined that it was a breach of fiduciary duty for the firm not to have calculated and earlier returned the surplus money to the clients. The surplus expenses were willfully and knowingly withheld from the clients, and such withholding has been found to be a clear and serious breach of the firm's fiduciary duty to it's clients. It has been argued that the O'Quinn firm never intended to return the excess client expenses. Based upon circumstantial evidence presented in this case, I concur with that argument. Therefore, we find a clear and serious breach of fiduciary duty against O'Quinn on the General Expense Fund Surplus issue.

In the lives of many claimants, a refund of money for general expenses could be in many ways life changing for these clients. After 40% was taken out of the $3,000,000 plus surplus, clients would get 60%. If it is a $1,000, $5,000 or $10,000 refund, this money to which each client was entitled, is and could be very important to them. I believe that this breach is much more serious than for example, an aggregate settlement. Entering into an unauthorized aggregate settlement is an avenue for plaintiffs' attorneys to settle a large number of cases. In that instance, plaintiffs' attorneys do not actually take money directly belonging to the clients. In our case before us, O'Quinn in fact took money from the clients, was not going to return it, and in fact took measures to conceal it. In other words, this is more than just putting the interest of the lawyer ahead of the clients. The

attorney client relationship triggers a deep trust in attorneys by the clients. The clients entrusted the money to the lawyers, and the lawyers did not and probably would not have ever given it back.

2. FUNDING OF PUBLIC MEDIA CAMPAIGNS

O'Quinn witnesses in essence testified that a PR and media campaign was launched by the firm to influence public opinion, potential jurors, and judges to a more favorable position regarding breast implant claims. (Arbitration transcript Vol II, Pgs. 48, 52). In other words, O'Quinn witnesses described it in their own words as "keeping our cases alive". Our rule of professional conduct, Rule 3.07 states that in the course of representing a client, a lawyer shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an advocatory proceeding. A lawyer shall not counsel or assist another person to make such a "statement". The approximate sum of $3,000,000 from the general expense fund was used to engage in conduct in violation of Rule 3.07. In other words, client expense money was used in this campaign.

The O'Quinn firm felt that the future of their clients' cases were in jeopardy because things were not going well in the media or in the Courts. The purpose of this PR media campaign was directed toward "keeping our cases alive". (Arbitration transcript Vol II, Pgs. 48, 52). "How do you keep your cases alive"? The evidence in my opinion is clear that in order to "keep their cases alive" the PR campaign was meant to influence and prejudice the fair administration of justice in the breast implant cases. Lawyer witnesses defended such a media campaign by using the excuse "the other side is doing it, so we need to do it too", and other such statements. The testimony of the lawyer witnesses was clear to me that it was the PR objective of O'Quinn to influence and affect judicial

proceedings. Defendants insist that "materially prejudicing" an outcome (as used in the Rule 3.07) has a different meaning than "influencing" an outcome. This pursing of words is not persuasive to me.

Would the violation of Rule 3.07 normally be a breach of fiduciary duty to a client? Normally not. However, in my opinion a lawyer's use of clients' money to engage in and be a part of a violation of this rule is a breach of fiduciary duty. If the attorneys had used their own money to finance this PR campaign, it would be irrelevant in my opinion to our proceeding. O'Quinn witnesses and others would argue that this was for the "benefit" of the clients. Bribing a judge might "benefit" the clients. Rigging a jury panel might "benefit" the clients. Also the argument was used that "the clients wanted us to engage in the PR campaign"! The clients were not informed that their money was being used by their lawyers in violation of the ethical rules of our profession. It is my opinion that this funding of PR is a clear and serious violation of O'Quinn's fiduciary duties to his clients.

3. FUNDING THE BAYLOR MEDICAL STUDY

O'Quinn fashioned the funding of a Baylor Medical Study in somewhat less than a straight forward manner. Several studies funded by manufacturers and others resulted in scientific/medical findings not supporting causation between exposure to silicone breast implants and diseases alleged in the women plaintiffs. O'Quinn set out to fund a study to counteract these medical study findings. It should be noted that even though this "Baylor Medical Study" involved some of the physicians at the Baylor College of Medicine, the actual study is not in any way vouched for and presented as coming from the Baylor College of Medicine, but merely by it's authors.

The name "CAPS" is found in the article as the entity funding the Baylor study. CAPS is an acronym for a group in support of the "women" in their battles with the manufacturers. O'Quinn used client money to fund the Baylor study through donations to CAPS. The method of funding is as follows:

O'Quinn would cut a check from the General Expense Fund to a designated breast implant client. The client would then send a check out of the client's account to CAPS. CAPS would in turn send the money to the Baylor study group. Medical studies ethics require that a statement of disclosure be made in every medical article or study as to who the individuals and/or entities are that are funding the study. This study at Baylor, funded in this deceptive way, nowhere states the study was being funded by plaintiffs' lawyers or O'Quinn. This was a deceptive practice involving clients' money. The clients were personally involved in the misrepresentation of the true funding of the Baylor study.

O'Quinn's business accountant testified that the method of funding was a "subterfuge". This funding was designed as a "subterfuge" upon the judicial system, the judges and juries alike. This was a "subterfuge" as to their own clients. If their own clients had attempted the onerous task of auditing the "fund", it would have been difficult at best to pick up on the "subterfuge" since checks from the fund went to plaintiffs as "settlement funds". But for the audit done by plaintiffs' counsel during the pendency of this case, the extent of this "subterfuge" would probably have never been uncovered.

An excuse for the "subterfuge" was given that Baylor wanted to distance themselves from plaintiffs' lawyers in this study. (Arbitration transcript Vol. II, Pgs. 70-71). Should we as the legal profession be guided by rules imposed upon us by Baylor? During our arbitration, we never heard

from Baylor witnesses on this subject and I question whether or not Baylor made such a request or requirement. In our professional conduct as attorneys, our dealing with courts, the judicial system, and in our practice in general, transparency should be our guiding principle. If Baylor did not want to do the study straight up, then go elsewhere. We are not as professionals to lower our standards to that of others with which we deal.

If the O'Quinn firm had determined to fund the study by other methods of deception it would not have been relevant to this case. The use of clients' money in the deception in my opinion makes it material. The use of clients' money to deceptively fund a study has breach of fiduciary duty written all over it. Some would argue that this was good for the plaintiffs. I believe otherwise. The deception employed, in connection with the goal of "keeping the cases alive" is a breach of fiduciary duty. What are the possible consequences of the uncovering of the deception? Judges and juries could be so incensed by the misrepresentations employed that the result could be the destruction of their clients' cases, rather than "keeping them alive".

Federal Judge Sam Pointer, in the Alabama MDL proceedings of the SBI litigation, appointed a panel of medical and scientific experts to evaluate the credibility of causation and other evidence in the SBI litigation. Another O'Quinn reason for funding the Baylor study was an attempt by O'Quinn to influence the outcome of the Judge Sam Pointer panel. If the medical and scientific expert members of the panel were to look at the Baylor study, panel members would not be able to tell that this study was funded by O'Quinn. The weight of this study as well as other evidence, is often determined by the origin of, the funders of, and the professional reputation of the authors. It is my opinion that the use of client money funding this study, in a purpose to "keep the cases alive", was a clear and serious breach of the fiduciary duty owing to their plaintiff clients. The combination of an

attempt to influence judicial proceedings, in combination with the potential of destroying all of the clients' cases, is a clear and serious breach of the fiduciary duties for which O'Quinn should forfeit fees.

CONCLUSION:

1. Breach of Contract

I would find that the damages resulting from a breach of contract to be in the amount of $6,000,000. This sum is the approximate amount used to persuade or influence judicial proceedings, both through the PR campaign and the Baylor study. I have previously found that plaintiffs were benefitted greatly from the outstanding work and results done by O'Quinn in plaintiffs' behalf. I can not include the $6,000,000 used by plaintiffs for PR and the Baylor study to reduce damages owed by O'Quinn.

2. Breach of Fiduciary Duty

There were several serious breaches of fiduciary duties. I would find that the amount of fee forfeiture should be substantially more than the $25,000,000 found by the majority panel. Please refer to *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). The central core for the reasoning in breach of fiduciary duty cases is derived from a review of the *Burrow v. Arce* opinion. There are arguments made in the *Burrow* case as to total, partial, and no forfeiture at all. On page 243 of the *Burrow* opinion the Supreme Court sets out the considerations to be addressed. One is the effect on the value of the lawyer's work for the clients. I find that the results of the lawyer's work for the client was not negatively impacted at all. The work of the O'Quinn firm resulted in great trial results when cases were tried, and in tremendous settlements for their clients. On page 244 of the *Burrow* opinion, the court included another consideration: the public interest in maintaining the integrity of attorney-

client relationships. To deter such breach of fiduciary duty conduct, and to let the public know that we will not and can not condone such breaches, forfeiture can not be meaningless. Some would argue that a $25,000,000 forfeiture is a mere "slapping of the wrist" of O'Quinn, and others will argue that it is too harsh. As *Burrow* tells us, every situation in every case is different and must be analyzed on it's own. I believe that a $25,000,000 forfeiture is a lower forfeiture than should be found under the circumstances of this case.

Concern for the integrity of attorney-client relationships is at the heart of the fee forfeiture "remedy" and we should make it very well known that the legal profession does not condone the conduct of O'Quinn in this case. John O'Quinn, the lawyer, testified that the Baylor study was done with his knowledge and that he knew it was done and was a part of making that decision. (O'Quinn testimony, Arbitration Transcript Vol. II, Pages 481, 482). This testimony along with other evidence, leads me to conclude that John M. O'Quinn was personally aware of funding of the PR campaign, the funding of the Baylor study, and the continued withholding of client expense money.

SIGNED AND ENTERED this 19th day of July, 2007.

Kenneth Tekell Sr.

Kenneth Tekell, Sr.

IN THE MATTER OF THE ARBITRATION BETWEEN:	§	
MARTHA WOOD, ET AL.,	§	PURSUANT TO THE RULES OF THE
Plaintiffs,	§	
v.	§	AMERICAN ARBITRATION ASSOCIATION
JOHN M. O'QUINN, PC d/b/a O'QUINN & LAMINACK, ET AL.,	§	
Defendants.	§	

ORDER DENYING MOTION TO DECERTIFY

Defendants John M. O'Quinn P.C. d/b/a O'Quinn & Laminack, *et al.* (collectively "O'Quinn") have filed a motion requesting that the class previously certified by a Majority of the Panel in this matter be decertified. The basis of O'Quinn's motion is that (1) the Majority certified the class without analyzing the potential *res judicata* effect of a judgment on claims not certified; and (2) the notice to class members was defective because it did not discuss the preclusive effect that may attach to uncertified claims.

O'Quinn never raised the issue of *res judicata* before class certification. The Class Determination Award, along with the proposed Notice that was ultimately sent to the class, were issued on February 6, 2006. O'Quinn did not file a motion to decertify until March 5, 2007. At no time during the intervening 13 months did O'Quinn raise any issue about the Class Determination Award failing to properly analyze *res judicata* issues or the Notice to the Class being deficient.

O'Quinn's motion to decertify indicates that it was prompted by the recent Texas Supreme Court case of *Citizens Ins. Co. of America v. Daccach*, 217 S.W.3d 430 (Tex. 2007). While the *Citizens Ins. Co.* case brought clarity to Texas law on the issue of *res judicata* in the

context of class actions, it did not create any new legal principles. *Compare, Phillips Petroleum Co. v. Bowden*, 108 S.W.3d 385, 402-04 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding that although a class action may be maintained with respect to particular issues when appropriate, Rule 42 is not meant to be an exception to *res judicata* and concluding that the trial court's class certification order impermissibly split claims) *with Compaq Computer Corp. v. Lapray*, 79 S.W.3d 779, 793 (Tex. App.—Beaumont 2002), *rev'd on other grounds*, 135 S.W.3d 657 (Tex. 2004) (stating that in class action splitting claims may be appropriate; fact that defendants engaged in course of activity giving rise to myriad claims, only some of which are suitable for class treatment does not mean certification is inappropriate); *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 610 (Tex. App.—Texarkana 1995, writ dism'd) (rejecting argument that by tailoring class to exclude parties claiming consequential damages, trial court risks subjecting claims for those damages to *res judicata*). Thus, if *res judicata* was truly an issue in this case, O'Quinn could have raised the issue much earlier (*i.e.*, at the class certification stage), instead of now (during the merits).

In *Citizens Ins. Co.*, the Court held that "Texas Rule of Civil Procedure 42 requires the trial court, as part of its rigorous analysis, to consider the risk that a judgment in the class action may preclude subsequent litigation of claims not alleged, abandoned, or split from the class action." 217 S.W.3d at 457. The Court specifically noted that "[a] trial court could . . . determine that the risk of preclusion is not high enough to refuse certification. For instance, the abandoned claims may be insignificant, unlikely to succeed in any proceeding, or not valuable." *Id.*

In support of its motion to decertify, O'Quinn points to the Class Representatives' abandonment of claims for usury and violations of the Texas Deceptive Trade Practice-Consumer Protection Act ("DTPA"). The Panel has examined these claims and, while it believes that they likely arise from the same underlying facts as the claims under which the Class

Representatives are proceeding (and therefore may be barred in any subsequent litigation), the Panel finds that the risk associated with the abandonment of them is not high enough to refuse certification because it is highly questionable whether either claim would succeed. Notably, O'Quinn does not contend to the contrary.

The elements of a usury claim are as follows:

1. the defendant loaned money to the plaintiff;
2. the plaintiff had an absolute obligation to repay the principal; and
3. the defendant contracted for, charged, or received interest that exceeded the maximum amount allowed by law.

First Bank v. Tony's Tortilla Factor, 877 S.W.2d 285, 287 (Tex. 1994); *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982). It is doubtful that the Class Members could satisfy any of these three requirements.

First, O'Quinn does not appear to have loaned the Class Members money. A "loan" is an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligor must pay the creditor. TEX. FIN. CODE ANN. § 301.002(a)(10) (Vernon 2006). It is the Panel's understanding that O'Quinn did not advance money to or on behalf of any particular Class Member; rather, O'Quinn used credit lines to generally finance the breast implant litigation and simply sought to pass the incurred interest expense on to the Class Members. Importantly, a plaintiff, *i.e.* a Class Member, must be an immediate party to the loan transaction to recover. *Allee v. Benser*, 779 S.W.2d 61, 62 (Tex. 1988). None of the Class Members were a party to O'Quinn's banking arrangements.

Second, there was no *absolute* obligation that the Class Members repay O'Quinn the principal. Instead, the Class Members were only obligated to reimburse O'Quinn *if* a recovery was obtained. *See* Defs' Ex. 1, ¶ 6. When the promise to repay a loan is contingent and it is uncertain whether the borrower would pay a usurious amount even if the contingency occurred,

the loan will not be considered an absolute obligation. *Rawkind v. Mortgage Funding Corp.*, 881 S.W.2d 203, 206-207 (Tex. App.—Houston [1st Dist.] 1994, no writ).

Finally, the Fee Agreement does not "charge" or "contract for" a determinable rate of interest. Instead, it simply allows O'Quinn to pass on to the Class Members "reasonable interest charged by the bank on [] borrowed funds." *Id.* Nor will a charge that is uncertain in value usually be considered interest. *First USA Mgmt. v. Esmond,* 960 S.W.2d 625, 627 (Tex. 1997). The parties have engaged in extensive discovery and the Panel has seen no evidence to indicate that O'Quinn attempted to deduct, or actually received, interest at a rate that exceeded the amount allowed by law.

A Class Member's DTPA claim would fare no better. Section 17.49(c) of the DTPA excludes "a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion or similar professional skill." TEX. BUS. COMM. CODE ANN. 17.49(c) (Vernon Supp. 2006). Given that O'Quinn was acting as the Class Members' legal counsel in connection with the events that gave rise to this proceeding, it is unlikely that the DTPA would even apply to the Class Members' claims. *See Rangel v. Lapin,* 177 S.W.3d 17, 23-24 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (finding that attorney's representations to client about qualification of firm members "were the type of advice, judgment, or opinion that the legislature specifically intended to exempt from the DTPA.").

But even if the Class Members were able to overcome the obstacle of this statutory exclusion, the Class Members' DTPA claims would provide little additional value. The Panel has already determined that the Class Members should prevail under their breach of contract and breach of fiduciary duty claims, and the Class Members will be receiving the full amount of their actual damages, pre-judgment interest and attorneys' fees, and additional monies pursuant to *Burrow v. Arce,* 997 S.W.2d 229 (Tex. 1999). The DTPA offers the Class Members little additional relief than what they can already recover. *See* TEX. BUS. & COMM. CODE ANN. §

17.43 (Vernon 2002) ("no recovery shall be permitted under both this subchapter and another law of both damages and penalties for the same act or practice."). The Class Members' claims focus solely on O'Quinn's conduct regarding the BI General Expense account. Any damages resulting from this conduct would entitle the Class Members to a single recovery regardless of the number of theories pled. *See generally, Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). The one satisfaction rule, coupled with Class Members' request for equitable relief in the form of fee forfeiture, suggests there exists little risk that a DTPA claim might add any additional value that would favor de-certification in this case. "[T]his is not a case where the class representatives are pursuing relatively insignificant claims while jeopardizing the ability of class members to pursue far more substantial, meaningful claims." *In re Universal Service Fund Telephone Billing Practices Litigation*, 219 F.R.D. 661, 669 (D. Kan. 2004).

In addition to requiring an analysis of the abandoned claims, *Citizens Ins. Co.* also states that "it is critical that putative class members be given adequate notice and an opportunity to exclude themselves from the class form of proceeding so that they may preserve individual claims that may otherwise be barred from subsequent litigation." 217 S.W.2d at 457-58. The Notice previously provided to the Class Members offered the follow description of this suit:

> This lawsuit is about whether O'Quinn made improper BI General Expense deductions from the funds that were distributed to its clients in connection with the settlement of breast implant claims.
>
> * * *
>
> In the lawsuit, the Plaintiffs say that O'Quinn made improper BI General Expense deductions from the funds that were paid to O'Quinn's clients in connection with the settlement of their breast implant cases and/or miscalculated certain of those deductions. You can read the Plaintiffs' Third Amended Petition by calling or writing to Class Counsel at the phone number or address listed below.

Notice, pp. 2-3. The Third Amended Petition that is referenced in the Notice included *both* the usury and DTPA violation allegations.

The Notice specifically warns the Class Members that if they stay in the proceeding "[they] give up any rights to sue O'Quinn separately about the same legal claims alleged in this lawsuit" and that if they elect to exclude themselves "[they] keep any rights to sue O'Quinn separately about the same legal claims alleged in this lawsuit." *Id.* at p. 1. After receiving this Notice, a number of Class Members "opted out" of the Class, thereby preserving their right to pursue O'Quinn separately if they so chose. The remaining Class Members did not elect to opt out. The Panel concludes that this Notice was sufficient to apprise the Class Members of the risks associated with not excluding themselves from the Class as it relates to the abandoned usury and DTPA violation claims and that no additional Notice is required.

O'Quinn's motion is hereby denied.

SIGNED AND ENTERED this 18th day of July, 2007.

David J. Beck

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