AlaFile E-Notice

01-CV-2003-006630.00

Judge: TOM KING, JR.

To: MCKEE BRUCE JONES
bruce@hwnn.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JOHN LAURIELLO VS CAREMARK RX INC ET AL
01-CV-2003-006630.00

The following matter was FILED on 6/15/2012 8:47:33 PM

D004 AIG TECHNICAL SERVICES INC

D002 AMERICAN INTERNATIONAL GROUP INC

D005 AMERICAN INTERNATIONAL SPECIALTY

D003 NATIONAL UNION FIRE INSURANCE

DEFENDANT'S POST-HEARING MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY THE CLASS

[Filer: KING MARK CHRISTIAN]

Notice Date: 6/15/2012 8:47:33 PM

ANNE-MARIE ADAMS
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
BIRMINGHAM, AL 35203

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CV-2003-006630.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
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STATE OF ALABAMA
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01-JEFFERSON - BIRMINGHAM

☐ **District Court** ☑ **Circuit Court**

Case ...

CV20...

JOHN LAURIELLO VS CAREMARK RX INC ET AL

CIVIL MOTION COVER SHEET

Name of Filing Party: D005 - AMERICAN INTERNATIONAL SPECIALTY

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.
Mark Christian King
400 North 20th Street
Birmingham, AL 35203

Attorney Bar No.: KIN017

☐ Oral Arguments Requested

TYPE OF MOTION

Motions Requiring Fee

- ☐ Default Judgment ($50.00)
- ☐ Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Judgment on the Pleadings ($50.00)
- ☐ Motion to Dismiss, or in the Alternative Summary Judgment($50.00)
- ☐ Renewed Dispositive Motion(Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Summary Judgment pursuant to Rule 56($50.00)
- ☐ Motion to Intervene ($297.00)
- ☐ Other ______________________

pursuant to Rule ______________ ($50.00)

*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

☐ Local Court Costs $ ______________

Motions Not Requiring Fee

- ☐ Add Party
- ☐ Amend
- ☐ Change of Venue/Transfer
- ☐ Compel
- ☐ Consolidation
- ☐ Continue
- ☐ Deposition
- ☐ Designate a Mediator
- ☐ Judgment as a Matter of Law (during Trial)
- ☐ Disburse Funds
- ☐ Extension of Time
- ☐ In Limine
- ☐ Joinder
- ☐ More Definite Statement
- ☐ Motion to Dismiss pursuant to Rule 12(b)
- ☐ New Trial
- ☐ Objection of Exemptions Claimed
- ☐ Pendente Lite
- ☐ Plaintiff's Motion to Dismiss
- ☐ Preliminary Injunction
- ☐ Protective Order
- ☐ Quash
- ☐ Release from Stay of Execution
- ☐ Sanctions
- ☐ Sever
- ☐ Special Practice in Alabama
- ☐ Stay
- ☐ Strike
- ☐ Supplement to Pending Motion
- ☐ Vacate or Modify
- ☐ Withdraw
- ☑ Other Defendant's Post-Hearing Memorandum of Law in Opposition to Plaintiffs' Motion to Certify the Class

pursuant to Rule n/a (Subject to Filing Fee)

Check here if you have filed or are filing contemoraneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees) ☐	Date: 6/15/2012 8:46:01 PM	Signature of Attorney or Party: /s/ Mark Christian King

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

ELECTRONICALLY FILED
6/15/2012 8:47 PM
CV-2003-006630.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JOHN LAURIELLO, JAMES O. FINNEY, JR., SAM JOHNSON, and CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM, Plaintiffs, v. CAREMARK RX, INC.; AMERICAN INTERNATIONAL GROUP, INC.; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; AIG TECHNICAL SERVICES, INC.; and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, Defendants.	)	CIVIL ACTION NO. 03-6630-TK

DEFENDANTS' POST-HEARING MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY THE CLASS AND APPOINT CLASS REPRESENTATIVES

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Rules and Regulations

This Post-Hearing Memorandum of Law is respectfully submitted by Defendants in opposition to Plaintiffs' motion for class certification. It is intended to supplement but not replace Defendants' Pre-Hearing Memorandum of Law ("Def. Pre-Hearing Mem.") submitted on May 15.

Submitted with this Memorandum are Defendants' Final Proposed Findings of Fact ("FPFF"), which supplement the Initial Proposed Findings of Fact filed on May 15 based on the evidence adduced at the class certification hearing ("Hearing"). Rather than have two sets of proposed findings for the Court to consider, Defendants have incorporated the Initial Proposed Findings into the Final Proposed Findings, so that the Court need only reference the Final Proposed Findings. The numbering of the Final Proposed Findings is identical to that of the Initial Proposed Findings, so that any reference to a given proposed finding in our Pre-Hearing Memorandum should now be treated as a reference to the parallel finding in the Final Proposed Findings. Other citation conventions in this Memorandum are in the footnote.[1]

For the reasons set forth in this Memorandum, in our Pre-Hearing Memorandum, and in the Final Proposed Findings of Fact, Plaintiffs' motion for class certification is due to be denied.

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[1] Citations to the transcript of the Hearing are "Tr. [page]." Citations to deposition testimony are "[Deponent] [page]" (*e.g.*, "Cauley xx"). Citations to deposition exhibits are "Ex. ##," with the exhibit numbers being in the range of 1 to 230. Citations to the additional exhibits submitted by Defendants are also of the form "Ex. ##," with the exhibit numbers being in the range of 1001-1050. Citations to the exhibits offered by Plaintiffs are of the form "PX ##," with the exhibit numbers being in the range 1 to 59. Substantially all of the deposition exhibits cited herein and in the Final Proposed Findings of Fact may be found in Defendants' three binders of Deposition Exhibits, which were submitted to the Court prior to the hearing and are on the disk provided to the Court by Defendants at the close of the Hearing; where a deposition exhibit is not in those binders that fact will be noted in the citation, and the exhibit may then be located within PX 43, which includes all exhibits from all depositions. To the extent other documents of record in this proceeding (prior motions or orders, for example) are cited, they are cited with descriptive names (*e.g.*, "Order Dated [date] Denying John Lauriello's Motion to Dismiss Claims Against Him").

PRELIMINARY STATEMENT

Under Ala. Code § 6-5-641(e), the Court's task is to conduct a "rigorous analysis" of Plaintiffs' misrepresentation and suppression claims by applying each of the Rule 23 prerequisites to determine whether the putative class may be certified. The parties agree that Plaintiffs bear the burden of proof on every issue. Here, Plaintiffs have moved under Rule 23(b)(1)(A) and, in the alternative, Rule 23(b)(3), so those are the subsections of Rule 23(b) the Court must consider. In addition, the Plaintiffs must prove that each of the four Rule 23(a) factors — numerosity, commonality, typicality, and adequacy — is satisfied.

There is no dispute here about whether the Rule 23(a)(1) and (a)(2) factors (numerosity and commonality) are met. They are. The evidence collected in this case and presented at the Hearing, however, makes clear that Plaintiffs have not met — and cannot meet — the requirements of either Rule 23(b)(1)(A) or Rule 23(b)(3). The motion for certification is due to be denied for that reason alone. Moreover, counsel seeking to represent the class are burdened with too many deficits — from their participation in the 1998 MedPartners Securities Litigation, from their representation of J. Brooke Johnston, and from certain aspects of their conduct in the current action — to adequately represent the putative class. Finally, the named Plaintiffs' claims are not typical of the claims of all class members they seek to represent, and they are not adequate representatives of the putative class as a result. For these reasons as well, certification should be denied.

Rule 23(b)

From the outset of the Hearing, two things have been clear.

First, there is no basis whatsoever to certify a class under Rule 23(b)(1)(A). There is no prospective conduct of defendants involved, and the Alabama Supreme Court squarely held in *Funliner*[2] that cases such as this, which seek only money damages, can *never* be certified under Rule 23(b)(1)(A). Plaintiffs' only response is to ask the Court to ignore the Supreme Court's unequivocal holding in *Funliner* and punt the matter to the Supreme Court. (Tr. 144) But because *both* sides have a right of appeal of this Court's class certification decision, *see* Ala. Code. § 6-5-642, Plaintiffs' request that the Court knowingly rule contrary to settled Alabama law is as unnecessary as it is inappropriate.

Second, the Alabama Supreme Court has never — not once — since the adoption of the Alabama Class Action Statute in 1999 permitted certification of a fraud class action under Rule 23(b)(3). It has rejected certification in each of the seven instances in which the issue was before it.[3] With reasonable reliance an element of a fraud plaintiff's case, the Supreme Court has consistently held that individual issues predominate over common issues, precluding class certification under Rule 23(b)(3). The individual issues in this case as to tolling of the statute of limitations — even if the world were not simply on notice of the excess insurance by reason of MedPartners' press releases and SEC filings[4] — make the point even clearer. Plaintiffs'

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2 *Funliner of Alabama, L.L.C.* v. *Pickard*, 873 So. 2d 198 (Ala. 2003).

3 *See Ex parte Household Retail Services, Inc.* ("*Ex parte HRS*"), 744 So. 2d 871 (Ala. 1999); *Compass Bank* v. *Snow*, 823 So. 2d 667 (Ala. 2001); *Reynolds Metals Co.* v. *Hill*, 825 So. 2d 100 (Ala. 2002); *Alfa Life Insurance Corp.* v. *Hughes*, 861 So. 2d 1088 (Ala. 2003); *Voyager Insurance Cos.* v. *Whitson*, 867 So. 2d 1065 (Ala. 2003); *University Federal Credit Union* v. *Grayson*, 878 So. 2d 280 (Ala. 2003); *Regions Bank* v. *Lee*, 905 So. 2d 765 (Ala. 2004). Professor Rubenstein admitted that each of his "examples" of fraud certifications predated the Class Action Statute. (Rubenstein 108-11)

4 As Mr. Haley admitted during the Hearing:

> In securities cases, if there is a public disclosure, when a company makes a public disclosure, the shareholders are charged with knowledge of what the company puts out in its financial documents. (Tr. 606)

This is indeed the law. *See*, *e.g.*, *Whirlpool Financial Corp.* v. *GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) ("A reasonable investor is presumed to have information available in the public domain"); *Berry* v. *Valence Technology Inc.*, 175 F.3d 699, 703 n.4 (9th Cir. 1999) ("Courts can impute knowledge of public information without inquiring into when, or whether, individual shareholders actually knew of the information in question").

effort to evade the unbroken line of Supreme Court authority by arguing reliance through counsel (or the Court[5]) is due to fail for at least two reasons.

> ***First***, as Dean Randall conceded (Tr. 416), ***a principal who actually knows the truth has no fraud claim even if his agent was deceived.*** This is black letter law. *E.g.*, *Su* v. *M/V Southern Aster*, 978 F.2d 462, 473 (9th Cir. 1992) ("[I]f the principal knows the true facts, the attempted deception may not be imputed to the principal."); *Sonecha* v. *New England Life Insurance Co.*, 124 Fed. Appx. 143, 146 (3d Cir. 2005) (same). Entirely apart from the December 17, 1998 press release, which the evidence shows was seen and commented on by at least one class member the day it was issued (FPFF ¶ 340), those members of the putative class who were still shareholders of MedPartners in 1999 received the 1998 MedPartners 10-K — with its disclosure both of the excess insurance and the premium paid for it — in April 1999, weeks before they received the notice of settlement and opt-out and claim forms (FPFF ¶ 80). Accordingly, there are tens of thousands of separate, individual issues as to knowledge, reliance, and the statute of limitations.
>
> ***Second***, each putative class member made his or her own decision in 1999 whether to opt out, claim, or do nothing, and Professor Rubenstein agreed that those decisions can only be investigated by talking with each class member:
>
> > A . . . We can agree that 23,490 claims were filed, so . . . I'm willing to say it's likely, therefore, that thousands of people filed claims. Maybe tens of thousands.

---

5 As stated during the opening (Tr. 228-29) and as set forth in Point I.A.2(c) below, whatever the merits of Plaintiffs' "third-party reliance" theory when based on reliance by *class counsel*, the theory has no merit when applied to reliance by *the Court*. The Court's function in approving a class settlement is a judicial function, and the remedy for deception *of the Court* is relief under Rule 60(b) or an independent action for fraud on the Court — both of which, the Supreme Court held in 2006, are *not* available here. *See Ex parte Caremark Rx, Inc.*, 956 So. 2d 1117, 1124-25 (Ala. 2006).

Q Okay. And every one of those people who filed claims made a conscious decision to participate in the settlement, correct?

A Yes.

Q And that would mean they have to have received the notice, correct?

A Probably, yeah. Yeah.

* * *

Q . . . [P]resumably, they had to get a notice to know — and a claim form to know they were entitled to file.

A I think they had to get a claim form at least. Probably got notice with it, yeah.

Q And reviewed it?

A Probably.

Q And they had to make a conscious decision that they were not going to opt out of the settlement if they were going to file a claim.

A Yeah. If they understood that opt out was an option, they made that decision. And the claim form would have — or the notice would have tried to explain that to them. But again, we're making a lot of assumptions.

Q Okay. And they would have elected not to file an objection if they understood they could make one?

A Correct.

Q And then every one of the people who submitted the claim would have made the decision they wanted to see what they were entitled to collect, the money, right?

A Yeah, probably. That sounds right.

* * *

Q . . . [A]ll those people [who would have made those decisions not to opt out, not to object, and to file a claim form] . . . made decisions for reasons that were important to them or what they perceived in their best interest, and that's going to differ from person to person or entity to entity.

A Yeah, that's true.

Q And there's going to be no way to know what the bases for those decisions were without talking to the individuals or entities who made them, correct?

A Generally speaking, that's correct. I mean, you're basically stating — you're basically implying what we talked about earlier, which is the general difficulty with certifying a fraud class, and really what you're getting at is that individuals make individual decisions. And if this settlement embodied a misrepresentation or a suppression, putting that aside for a minute, that each indi-

> vidual's decision about whether to accept the settlement or not had its own qualities to it. And so if you had to look at each individual's decisions, I think it's — I think you're right. I think it's fair to say each individual would have made that decision based on their own circumstances and their own analysis of what they wanted to do at that point.
>
> Q And, again, because of the way this settlement was structured, and we are talking about a class action — about a class action settlement, people made those individual decisions before sending in those claim forms here, didn't they?
>
> A That is correct. (Rubenstein 118-22)

Thus, as Plaintiffs' expert recognized, the misrepresentation and suppression claims cannot be resolved without undertaking these pervasive, individualized inquiries into the circumstances of each class member's individual decision regarding the settlement. That is the antithesis of the common proof required to justify certification under Rule 23(b)(3).

For these reasons, and as discussed in more detail below, Plaintiffs' motion is due to be denied for failure to satisfy Rule 23(b), regardless of adequacy or typicality issues under Rule 23(a). Because the Court is required by Ala. Code. § 6-5-641(e) to address *all* of the Rule 23 factors, however, we must continue to brief the Rule 23(a)(4) adequacy issues and the Rule 23(a)(3) typicality issues as well.

Adequacy of Counsel

The evidence at the Hearing, we submit, established beyond a doubt that the Hare Wynn and North Firms cannot act as class counsel in this case. The conduct of these lawyers in the underlying case — what they did or did not do to investigate the fairness of the settlement and what they knew or should have known about the excess insurance — is at the very heart of this case. That is especially so because Plaintiffs are taking the position here that it was the lawyers in the prior case, acting as agents of the class, who were misled. Plaintiffs here go on to assert that the knowledge and conduct of the lawyers in the prior cases are imputed to the entire class. And the Hare Wynn and North Firms were some of those lawyers. Their own experts acknowledge that they had duties to the 1999 class. (Rubenstein 133-35, 137-39; Tr. 405-06 (Randall)) How, then, can their own knowledge, actions, and inactions in the prior cases not be directly at issue in this case? Plaintiffs go even farther in their opening statement. They say that the details of the excess policy continued to be suppressed from ***them*** after the 1999 settlement throughout ***their*** representation of J. Brooke Johnston and other former Caremark employees. They cite to responses to discovery requests ***they*** served; they cite to and interpret as sinister answers to deposition questions ***they*** asked. These lawyers (including Mr. Somerville as counsel for Mr. Johnston), who are seeking to represent the class, are saying they themselves were misled. Indeed, they assert the statute of limitations was tolled for the entire class until Mr. Haley himself discovered the alleged fraud. How, then, can these lawyers not be necessary witnesses? How can the case possibly be tried fairly if the Defendants are not given the opportunity to offer the testimony of these very lawyers to support their contention that any reliance by any lawyer who had duties to the class was unreasonable and that the statute of limitations has run as a result of what these very lawyers knew or should have known? That is the very heart of Defendants' case. Before delving into a single ethical issue involving proposed class counsel, Defendants submit that there is simply no way proposed class counsel can act as lawyers in this case given their involvement in the prior ones and thereafter as counsel for Mr. Johnston.

Although the involvement by proposed class counsel in the prior cases is alone disqualifying, the inadequacy issues do not stop there. The hearing evidence substantiated a long list of additional disqualifying conduct, both in the prior cases and this one, including the following:

The Hare Wynn and North Firms took an $800,000+ fee from the <u>Blankenship</u> litigation, although they did no work on the case, were not referring counsel, and not only did not obtain the <u>Blankenship</u> plaintiffs' consent but, indeed, did not even know those plaintiffs

existed. There is simply no way that this fee can be squared with Rule 1.5(e); it does not meet any of the criteria of Rule 1.5(e)(1) and it fails (at least) Rules 1.5(e)(2) and 1.5(e)(3) as well.

The Hare Wynn and North Firms made Mr. Lauriello whole with a portion of their fee from the class action settlement and thus violated Rule 5.4. The attempt to characterize the payment as a "fee reduction" is a non-starter. Mr. Lauriello owed the Hare Wynn and North Firms no fee at all; their fee came from — and only from — the class and the *Blankenship* plaintiffs. The Hare Wynn and North Firms, however, did not *return* any portion of their fees to those who had paid them. Instead, they *transferred* to Mr. Lauriello an amount that was more than 30 times his share of the class settlement. And where, as here, one of the theories of Plaintiffs' case includes the alleged withholding of information from the Court, the Hare Wynn and North Firms' own affirmative decision not to disclose to the Court their payment to Mr. Lauriello underscores the "material limitations" they would face were they to represent a class in this action.

Proposed Class Counsel represented plaintiffs and a defendant in this case at the same time. That violated Rule 1.7, plain and simple.

The Lead Counsel Agreement executed by Proposed Class Counsel does not further the interests of the class. This agreement effectively ended Intervenor counsel's ability to probe in discovery the very adequacy issues the Alabama Supreme Court had deemed important to probe.

Plaintiffs' own ethics expert agrees that the ethics of proposed class counsel's conduct is something this Court is required to consider. Defendants submit that when the lawyer as witness issues outlined above are coupled with the other ethical issues that were addressed at the Hearing, both in the prior cases and this one, whether proposed class counsel survive a rigorous adequacy analysis is not a close call.

Adequacy of the Named Plaintiffs and Typicality

The proceedings at the Hearing confirmed what was clear at the outset in any event: these named plaintiffs cannot represent a class that includes TAPS and Tender Offer claimants, nor can they represent a class that includes individuals who did not submit a claim at all. As a result, Plaintiffs' claims are not typical of those of their proposed class, and they are inadequate representatives of that class.

STATEMENT OF FACTS

All proposed findings of fact contained in Defendants' Post-Hearing Proposed Findings of Fact on Class Certification Issues ("FPFF"), filed simultaneously with this memorandum of law, are incorporated by reference herein.

ARGUMENT

As set forth in our Pre-Hearing Memorandum, and as made even clearer by the evidence presented at the Hearing, Plaintiffs have not met their heavy burden of showing by "substantial evidence" that the putative class meets all four requirements of Alabama Rule of Civil Procedure 23(a) and the requirements of one of the categories of Rule 23(b). *See Atlanta Casualty Co.* v. *Russell*, 798 So. 2d 664, 666 (Ala. 2001); *National Security Fire & Casualty Co.* v. *DeWitt*, 2011 WL 5607802, at *12 (Ala. Nov. 18, 2011). In deciding whether Plaintiffs have met this burden, this Court must employ "a rigorous analysis" of each of the Rule 23 factors in the context of the misrepresentation and suppression claims now asserted. ALA. CODE § 6-5-641(e). Plaintiffs wrongly assert in their supporting brief that "it is Defendants who are insisting on a 'rigorous analysis'" of the Rule 23 requirements. (Pl. Pre-Hearing Br. 1 n.1) In fact, it is the Alabama legislature and the Alabama Supreme Court that have so insisted.

Plaintiffs' motion for class certification is explicit: it seeks certification under Rule 23(b)(1)(A) or, in the alternative, Rule 23(b)(3). For the reasons set forth above and in our Pre-

Hearing Memorandum, and discussed further below, Plaintiffs have wholly failed to meet their burden on those issues. Accordingly, the motion for class certification is due to be denied for failure to satisfy Rule 23(b). And because Plaintiffs have failed to establish typicality under Rule 23(a)(3) or adequacy of representation under Rule 23(a)(4), their motion is due to be denied for those reasons as well.

I.

PLAINTIFFS HAVE NOT MET THE STANDARDS FOR CERTIFICATION UNDER RULE 23(B)

At the Hearing, Plaintiffs were candid — as they had to be — that Alabama law does not support their arguments that this case should be certified under Rule 23(b)(1) or Rule 23(b)(3). As to Rule 23(b)(1), Plaintiffs conceded at the Hearing that, if this case were to be certified under Rule 23(b)(1), it "would be a departure from the ordinary use of (b)(1)." (Tr. 143; *accord id.* at 147) And as to Rule 23(b)(3), Plaintiffs were forced repeatedly to describe this case as "unique" (*e.g.*, Tr. 100, 110-12, 128, 130, 143, 147) in their attempt to persuade this Court to do what the Plaintiffs (and Professor Rubenstein) concede that the Alabama Supreme Court has *never* done since the Alabama Class Action Statute was passed in 1999 — namely, find that the predominance requirement of Rule 23(b)(3) has been met in a fraud case.

But try as they might to avoid powerful and controlling precedent that precludes certification in this case, Plaintiffs cannot fit a square peg into a round hole. Under clear and well-established Alabama law, the misrepresentation and suppression claims in this case cannot be certified for class treatment under *any* of Rule 23(b)(1)(A), Rule 23(b)(1)(B), or Rule 23(b)(3).

A. This Is a Typical Fraud Case That Cannot Meet the Predominance Requirement of Rule 23(b)(3)

Plaintiffs repeatedly posit that there is something "unique" about this fraud claim that allows it to be certified under Rule 23(b)(3) (*e.g.*, Tr. 100, 110-12, 128, 130, 143, 147), notwithstanding overwhelming precedent in Alabama holding that fraud claims are not appropriate for Rule 23(b)(3) certification. But while aspects of this case are admittedly unique, there is nothing at all unique about the elements of the fraud claims that must be rigorously analyzed for purposes of Rule 23(b)(3). Like many other cases that have been examined under Alabama law, the basis of Plaintiffs' claim here is simply an alleged fraud on a group of people. Since the Alabama Class Action Statute was passed in 1999, the Alabama Supreme Court has repeatedly — and without exception — declined to find such fraud cases appropriate for class treatment under Rule 23(b)(3).

1. Individual Issues Predominate in the Proof of the Elements of Plaintiffs' Fraud Claims and in the Applicable Defenses

As argued in Part III.A of Defendant's Pre-Hearing Memorandum, Plaintiffs cannot satisfy the requirement under Rule 23(b)(3) that common questions predominate, because individual issues overshadow any common issues in this case. First, Plaintiffs' misrepresentation and suppression claims require that Plaintiffs prove that (1) Plaintiffs either were aware of a false statement or not aware of a suppressed fact, and (2) Plaintiffs reasonably relied on the statement or omission to their detriment. *See Reynolds Metals*, 825 So. 2d at 105 (misrepresentation); *Ex parte HRS*, 744 So. 2d at 879 (suppression). Accordingly, Defendants are entitled to determine each individual class member's level of knowledge and awareness of the Company's insurance coverage as part of the assessment regarding each class member's claim, including whether each individual class member's reliance on any alleged misrepresentation or suppression was reasonable. Those are inherently individualized inquiries, due to material variations in what each putative class member knew and relied upon in deciding whether to participate in the settlement of the 1998 MedPartners Securities Litigation and in the timing and extent of each putative class members' knowledge of the excess insurance and the various public disclosures concerning that insurance.

In defending this case, Defendants will be entitled to inquire as to (i) whether a putative class member read any or all of the five public disclosures by MedPartners concerning the excess insurance; (ii) how that putative class member interpreted those disclosures, if s/he read them; (iii) what that putative class members' basis was for participating in the settlement; and (iv) whether that putative class member would have participated in the settlement even if s/he knew about the excess insurance. All of these issues are relevant to the element of reasonable reliance; all would not only cause individual issues to predominate in any trial in this case, but would threaten to derail any trial altogether.

Every class member deposed in this case has provided different reasons for choosing to be bound by the settlement in the 1998 MedPartners Securities Litigation. (FPFF ¶¶ 379-80, 382, 385-87, 389) They relied on different information and ultimately chose to be bound by the settlement for different reasons. Moreover, there is evidence that class members had varying degrees of knowledge regarding the Policy, with at least one potential class member in this class — a named plaintiff in the *Blankenship* matter — reviewing the December 17, 1998 press release disclosing the Policy on the very same day it was issued and inquiring that same day as to the extent to which the Policy impacts the resolution of the 1998 MedPartners Securities Litigation. (FPFF ¶ 324) Thus, the evidence *already* shows individual variations among class members.

Moving beyond the evidence already developed, Defendants are entitled as a matter of law to investigate *each class member's* level of sophistication and knowledge of the excess insurance to explore, *as to that class member*, whether there was in fact reasonable reliance on the allegedly misrepresented or suppressed information. Plaintiffs' argument (Tr. 139-40) that Defendants have not pointed to any actual putative class member who fits the hypothetical in our Pre-Hearing Memorandum (at 32) misses the point entirely. The point is not whether there is evidence of such a class member at this stage of the proceeding, but rather that Defendants have a due process right to require that each class member prove the elements of his/her claim and, thus, Defendants have a right to investigate whether each class member reasonably relied on the allegedly misrepresented or suppressed information.

In a similar vein, Defendants are entitled to explore *each class member's* evaluation of the benefits of an early settlement for claimants against a company that was facing an imminent risk of bankruptcy wholly apart from any exposure presented by the 1998 MedPartners Securities Litigation. Mr. Cauley testified that he was concerned about the possibility of a MedPartners bankruptcy at the time of the settlement, *irrespective* of the insurance issues. (Cauley 147, 193, 235, 275, 297, 317) Where, as here, a D&O policy provides coverage to the company as well as to the directors and officers, the proceeds of that policy become part of the company's estate (and, thus, subject to the automatic stay) in the event of bankruptcy.[6] Like the underlying D&O policies — and like D&O policies in the 1998 timeframe in general — the AISLIC Policy here provided coverage not just to MedPartners' directors and officers, but to MedPartners itself.[7] Accordingly, there was a serious risk — which both Mr. Cauley and Mr. Park focused on

6 *See*, *e.g.*, *In re Vitek, Inc.*, 51 F.3d 530, 534 n.17 (5th Cir. 1995); *In re Sacred Heart Hospital*, 182 B.R. 413, 420 (Bankr. E.D. Pa. 1995); *Circle K Corp.* v. *Marks* (*In re Circle K Corp.*), 121 B.R. 257, 260-61 (Bankr. D. Ariz. 1990).

7 The policy covered "Securities Loss," which was defined as:

> any and all settlements of, final judgments in and Securities Defense Costs incurred in connection with the Actions, including fines, penalties, exemplary or punitive damages, payable **by the Company** or by its current or former directors and officers defendants in the Actions, whether, **in the case of the Company, in satisfaction of its own obligation to any claimant or as indemnification of the Company's current or former directors and officers** defendants in the Actions, provided, however, any Securities Loss paid by the Insurer and recovered by the Company (net of any plaintiffs' attorneys fees paid by the

Footnote continued on next page.

(Cauley 275, 297; Robbins Geller (Park) 98) — that any insurance proceeds needed to fund the settlement would have gotten tied up in MedPartners' bankruptcy estate had the company gone under. Any of the thousands of class members who received MedPartners' 1998 10-K (which showed a negative net worth of ***$1.1 billion***) only a few weeks before they got their notice of class settlement could well have concluded that *any* settlement in such circumstances was a good settlement. Which ones did think that way, and which did not, is a classic individualized inquiry that precludes certification under Rule 23(b)(3). As Professor Rubenstein admitted in the testimony quoted at the outset of this brief, the only way to get the answers to these questions is to ask the individual class members — and there are tens of thousands of them.

Entirely apart from knowledge and reasonable reliance, moreover, individual issues also predominate on the statute of limitations. To the extent that, at any time before October of 2001, any class member had actual knowledge of MedPartners' procurement of excess insurance, or should have known of the insurance based on his receipt of information and personal sophistication, that class member's claim is time-barred. Uncovering each class member's knowledge in this regard — and the timing of it — would require individualized inquiries of the same tens of thousands of absent class members, as would evaluating reasonable reliance.

For all these reasons, this case is not "unique" at all, but rather is like every other fraud case as to which class certification has been sought, and denied, in Alabama in the last 13 years. Individual issues predominate over common issues, and certification under Rule 23(b)(3) cannot be granted.

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Company) shall be contributed by the Company to the settlement of or judgment in the Actions which are not derivative Actions." (Ex. J4 to Pl. Ex. 40 at 2-3 (boldfaced emphasis added)).

2. Plaintiffs' Efforts To Evade the Predominance Requirement Are Due To Fail

At the Hearing, Plaintiffs raised two main arguments in favor of finding that common issues predominate. First, they attempted to use the concept of the class as an entity to support Professor Rubenstein's argument that agency principles solve the grave predominance problems in this case. Second, they reiterated the argument made in their brief that "assertions of affirmative defenses do not prevent certification." (Tr. 138) Neither of these arguments is valid.

(a) Plaintiffs' "Entity Theory" Is Erroneous, Was Rejected by the Alabama Supreme Court, and Cannot Be Used to Circumvent the Predominance Requirement

As we showed in our Pre-Hearing Memorandum, Professor Rubenstein's novel agency theory does not negate the predominance of individualized issues. (Def. Pre-Hearing Mem. 33) Regardless of what knowledge is imputed to a principal through her agent, the actual knowledge and reliance of the principal is still relevant to the principal's fraud claim. Dean Randall conceded as much (Tr. 416), and the proposition is black letter law. *Su* v. *M/V Southern Aster*, *supra*, 978 F.2d at 473; *Sonecha* v. *New England Life Insurance Co.*, *supra*, 124 Fed. Appx. at 146. Accordingly, individualized inquiries are still required.

Plaintiffs' response to any and all individualized issues is to reiterate that the victim of the alleged fraud was the 1999 class as an "entity," not a group of individuals. (*E.g.*, Tr. 132-33, 144-45) Under Plaintiffs' entity theory, the knowledge of individual class members is irrelevant because the true party in interest is the class itself. The class, in turn, like a corporate entity, can only gain knowledge through its agents: class counsel, not absent class members.

Plaintiffs' entity theory, of course, is nothing new. Plaintiffs made the same argument to the Alabama Supreme Court nearly seven years ago, as a rationale for letting this case proceed with the already-certified 1999 class and avoiding the "rigorous analysis" required by the Alabama Class Action Statute.[8] The Alabama Supreme Court has already squarely rejected that argument in this case. The existence of the 1999 class, the Court held, established no more than that "a discrete and identifiable group of individuals" could conceivably bring claims against Defendants here. *Ex parte Caremark Rx, Inc*., 956 So. 2d 1117, 1125 (Ala. 2006). In requiring this Court to perform "the 'rigorous analysis' contemplated by Rule 23 . . . and by § 6-5-641," the Supreme Court expressly held that "***the members of the purported class*** must be analyzed in terms of their relationship to the particular claims and defenses to be asserted in the class action." *Id.* (emphasis added). Lest there be any doubt, the Court reiterated that it was the "***claims of the purported class members***" — not the imagined single claim of an abstract class entity — that "must be analyzed" before certification. *Id.* at 1126 (emphasis added). Not once in the opinion did the Court suggest that the claims asserted here belong to anyone other than the individuals constituting the putative class, and not to the "class" as a distinct entity. The Supreme Court's holding is the law of this case and requires rejection of Plaintiffs' "entity theory."

But Plaintiffs' entity theory would have to be rejected even if this case had never been to the Supreme Court, because the theory leads unavoidably to absurd results, results that defy common sense and render Rule 23(b)(3)'s due process protections in the context of proposed class actions meaningless. As Plaintiffs themselves point out: "[I]f the class itself is what was defrauded, then . . . *by logical definition, individual class members can't litigate that claim*. . . . You can't have individual members litigating that same claim." (Tr. 145 (emphasis added)) In other words, the entity's claim *replaces* the class members' individual fraud claims, rendering the individual claims at most derivative of the entity's claim (and perhaps extinguish-

8 *See* 10/6/2005 Brief of Appellee Lauriello at 3 ("the already-certified 1999 class was the legal entity that was defrauded"); *id.* at 40 ("A single legal entity, the 1999 class, was defrauded (allegedly) by Caremark and AIG"); *id.* at 42-43 ("[T]his unique case presents a situation where an already-certified class, in its capacity as a class, was defrauded. . . . Thus, the proper party plaintiff is the already-certified 1999 class").

ing them altogether). Indeed, if an individual were to attempt to bring a fraud claim against the Defendants, s/he "would have to prove that the *class* [rather than the individual] was defrauded," and "the evidence would be . . . was the *class* [rather than the individual] defrauded." (Tr. 145-46 (emphasis added)) Individualized evidence, according to Plaintiff's theory, would be both unnecessary and irrelevant.

But now consider the sophisticated class member who, in 1998-1999, read and understood each of the five separate public disclosures of the excess insurance. For Plaintiffs' entity theory to be right, any evidence about this person would be legally irrelevant, since only the reliance of the *class* (through its agents) matters. Thus, even if this sophisticated individual had obtained a copy of and read the excess insurance agreement and concluded that it did not matter to him or her in evaluating the fairness of the settlement, Defendants would be precluded from asserting that that individual's claim should be treated any differently than those of everybody else in the putative class. Individual defenses to that putative class member's claims would be forbidden, regardless of their potential merit.

As a matter of due process, however, that simply cannot be right. "'Due process requires that there be an opportunity to present every available defense.'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). Plaintiffs' "entity theory," if accepted, would deprive defendants of that opportunity and would thus violate defendants' right to due process.

On the other side of the coin, accepting Plaintiffs' entity theory would also violate the due process rights of the putative class members, because it would effectively nullify Rule 23(b)(3)'s opt-out right. When a class is certified under Rule 23(b)(3), class members must be given notice of their opportunity to exclude themselves from the class so as to preserve their right to bring an independent claim. *See* ALA. R. CIV. P. 23(c)(2). Indeed, as the United States

Supreme Court has made clear, "[i]n the context [as here] of a class action predominantly for money damages . . . absence of notice and opt-out violates due process." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2559 (2011). If, as Plaintiffs argue, the putative class is asserting its claim as a single entity for purposes of Rule 23(b)(3), a putative class member seeking to exercise his or her constitutional right to opt out has no individual claim with which to opt out. That is, under Plaintiffs' entity theory — which is essential to their argument under Rule 23(b)(3) that individualized issues do not predominate — the right to opt out becomes illusory *because individual claims may not be considered independently of the putative class's claim.* As Plaintiffs' put it, "if the class itself is what was defrauded, then . . . *by logical definition, individual class members can't litigate that claim.* . . . You can't have individual members litigating that same claim." (Tr. 145 (emphasis added)) The United States Supreme Court, however, has made it clear that precluding individual claims is constitutionally impermissible in cases, such as this one, where the relief sought is predominantly money damages. *Dukes*, 131 S. Ct. at 2559.

In the end, distinct cases *cannot* be treated identically. Defendants *are* legally entitled to raise valid defenses to individuals' claims, and Rule 23(b)(3)'s opt-out right *must* be more than empty statutory text.

And there is more. The entity that Plaintiffs say must be allowed to pursue its supposedly unitary, indivisible claim actually comprises three distinct subclasses — the Common Stock/Options Class, the TAPS Class, and the Tender Offer Class. As set forth in Point III.A below, there are levels of recovery at which the TAPS and Tender Offer class members would receive ***more than 100% of their actual loss***. That result would be nonsensical, but it is an unavoidable consequence of Plaintiffs' "entity class" theory.

Incorrect results flow from Plaintiffs' entity theory because the theory is incorrect. Plaintiffs' claim — like all class action claims — is not a unitary claim held by an entity, but "an aggregation of what are unambiguously pre-existing *individually held* claims." Martin Redish & Nathan Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1593 (2007). Rule 23 is simply a procedural mechanism by which individual claims are joined if they can be efficiently and simultaneously adjudicated based on the named representative's claim. *See id.* But given the nature of Plaintiffs' claims here, joining these claims would create none of the efficiencies that would simplify adjudication. The individualized circumstances of each class member's claim must still be evaluated, precluding any efficiencies associated with the class action device.

The class action's status as an aggregation of individual claims helps explain why Plaintiffs' analogy to corporate fraud claims is unavailing. In a corporate fraud action, the corporation — not any of its component employees — holds the claim, and its employees' knowledge of a fraud is only relevant insofar as that knowledge is found to constitute the corporation's knowledge. *See*, *e.g.*, *Chicago Title & Trust Co.* v. *First Arlington National Bank*, 454 N.E.2d 723 (Ill. App. Ct. 1983) (knowledge of employee who did not transact with defendant irrelevant to fraud claim); *Sequa Corp.* v. *Cooper*, 128 S.W.3d 69 (Mo. Ct. App. 2003) (knowledge outside scope of employee's authority not imputed to corporation in fraud claim). But in a class action fraud claim for damages, for all the reasons set forth above, it is the *individual class members* — not the abstracted class to which they belong — who hold the claim. Thus, *each individual*'s knowledge and reliance are relevant. As the Court held in *Su* v. *M/V Southern Aster*, *supra*, 978 F.2d at 473, "if the principal knows the true facts, the attempted deception may not be imputed to the principal." Here, as has been shown time and again, the individual issues predominate in this case and preclude certification under Rule 23(b)(3).

(b) Affirmative Defenses Can and Do Defeat Predominance Under Rule 23(b)(3)

In an attempt to avoid at least one set of individualized issues that face the putative class, Plaintiffs argue that the Court should not pay attention to the individualized issues arising from Defendants' statute of limitations defense simply due to its status as an affirmative defense.[9] (*See* Pl. Pre-Hearing Br. 148-51; Tr. 137-40) That is not the law.

First, notwithstanding Plaintiffs' assertions to the contrary, courts routinely refuse to certify classes under Rule 23(b)(3) whenever individualized issues in connection with a statute of limitations defense predominate over issues common to the putative class. *See*, *e.g.*, *Thorn* v. *Jefferson-Pilot Life Insurance Co.*, 445 F.3d 311, 321-27 (4th Cir. 2006) (affirming denial of certification where "statute of limitations defense presented issues that cannot be determined on a class-wide basis," noting that "the district court here must conduct an individual inquiry into the information each class member actually possessed to determine whether each class member had actual or constructive knowledge" of defendant's conduct); *Johnson* v. *Kansas City Southern Ry.,* 208 Fed. Appx. 292, 296-97 (5th Cir. 2006) (affirming denial of class certification where "it is clear that the plaintiffs' individual issues, *e.g*., statute of limitations . . . predominate over the common ones"); *Butler* v. *Sterling, Inc.*, 210 F.3d 371 (Table), 2000 WL 353502, at *7 (6th Cir. 2000) (affirming denial of class certification where statute of limitations caused individualized issues to predominate); *Fisher* v. *Ciba Specialty Chemical Corp.*, 238 F.R.D. 273, 308-10 (S.D. Ala. 2006) (denying motion for class certification in part because statute of limitations defense defeated predominance, noting that "the date on which a plaintiff 'reasonably should have known' [of defendant's alleged misconduct] will necessarily vary for each plaintiff"); *LaBauve* v. *Olin Corp.*, 231 F.R.D. 632, 674-75 (S.D. Ala. 2005) (denying motion for class certification in

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9 Counsel appeared as well to attempt to create an "affirmative defense" of non-reliance by individual class members (Tr. 137-38), but that is a complete non-starter. Reasonable reliance is, and always has been, an element of Plaintiffs' affirmative case in a fraud case.

part due to lack of predominance, finding "[t]he primacy of individual-specific proof considerations [to be] further magnified under the lens of defendants' statute of limitations defense").

Second, although the statute of limitations is an affirmative defense, the crucial issue here is one on which *Plaintiffs* bear the burden of proof. Where, as here, the statute would clearly have run but for an assertion that the tolling provisions of ALA. CODE § 6-2-3 are in play, it is up to plaintiff to plead and prove that tolling is appropriate. *See Amason* v. *First State Bank*, 369 So. 2d 547, 550 (Ala. 1979) ("Of course the burden is upon he who claims the benefit of [§] 6-2-3 to show that he comes within it."); *Parsons Steel, Inc*. v. *Beasley*, 522 So. 2d 253, 256 (Ala. 1988) ("The burden is thus on the party bringing an action for fraud to show that he comes within the purview of [ALA. CODE § 6–2–3], if it otherwise appears that the statutory period has expired.").

Third, Plaintiffs' reliance at the Hearing (Tr. 138-39) on *U-Haul Co.* v. *Johnson*, 893 So. 2d 307 (Ala. 2004), to support their argument that individualized issues in connection with affirmative defenses need not be considered by this Court is completely misplaced. In *U-Haul*, the Supreme Court *relied* on the existence of an affirmative defense to *vacate* an order granting class certification. *Id.* at 312-13. Plaintiffs there had sought to certify a class of truck renters in a breach of contract action against a rental company that allegedly miscalculated the tax on its truck rentals, *id*. at 308-10, and defendants asserted the voluntary payment doctrine as an affirmative defense. The trial court failed to address this defense in its order granting class certification, *id.* at 312, and the Supreme Court held this omission to have been *an abuse of discretion*, vacating the class certification order and remanding "to allow the trial court to conduct such further proceeding as may be necessary to consider the effect on the issue of class certification of the *U-Haul* defendants' assertion of the voluntary payment defense," *id*. at 312-13. The quote from *U-Haul* that counsel recited to the Court during his opening statement comes *not* from the majority opinion but from a concurrence, and even the concurrence never states that the court need not consider individualized issues in connection with an affirmative defense. Rather, the concurrence acknowledged "respectable authority" to support the Court's holding but suggested that "Courts should be skeptical of a putative class-defendant's claim that an affirmative defense would require individualized inquiries that foreclose class certification." *Id.* at 314 (Johnstone, J., concurring specially).

Here, of course, no skepticism at all is appropriate: Plaintiffs must necessarily plead to and address the tolling issue, because all agree the statute has run but for the possible impact of § 6-2-3, and the numerous public disclosures of the excess insurance mean that Plaintiffs' timeliness problems are very real indeed. In any event, just a month after *U-Haul* was decided, the Supreme Court, in *Mayflower National Life Insurance Co.* v. *Thomas*, 894 So. 2d 637 (Ala. 2004), vacated another order granting class certification due to a trial court's "failure to conduct a rigorous analysis [because of] its failure to properly consider the defenses of the defendants." *Id*. at 642. There can be no doubt that the quoted concurrence in *U-Haul* is *not* the law of Alabama.

The statute of limitations defense in this case necessarily requires litigation of individualized issues. Different putative class members may have seen different public disclosures concerning the excess insurance or may have interpreted them differently.[10] For example, the 1998 MedPartners 10-K, which contained a public disclosure regarding the excess insurance, was mailed to all then-current shareholders in April 1999. (*See* Exs. 1049, 1039) The settlement class in the 1998 MedPartners Securities Litigation encompassed both those shareholders who had sold their MedPartners stock prior to the end of the class period (such as Sam Johnson (*see* Ex. D to Ex. 196)) and those who still held their MedPartners stock at the end of the class period

10 We say again that the disclosures in the press releases and public filings admit *only* of the interpretation placed on them by Messrs. Toll and Squitieri — that the excess insurance was so substantial that it covered *any* possible judgment or settlement. But if individual differences in interpretation are possible, they are just that — *individual* differences in interpretation.

(such as James O. Finney (*see* Ex. B to Ex. 196). Thus, many — but not all — putative class members were sent the 10-K directly. Because different putative class members will have different levels of sophistication and will have had different levels of exposure to the public disclosures about the excess insurance, the inquiry as to whether each putative class member either knew or should have known about the alleged fraud will be inherently individualized.

(c) To the Extent Plaintiffs' "Reliance by Agent" Theory Depends on Reliance by Judge Wynn, It Is Due To Fail for the Additional Reason That the Court Acts in a Judicial Capacity When Approving a Settlement and Not as the Class Members' Agent

It is not at all clear whether Plaintiffs still seek to avoid the Rule 23(b)(3) predominance requirement through reference to reliance-by-agent, since much of their "class as entity" argument at the Hearing seemed to be an effort to avoid the clear, black letter law — agreed to by their own expert — that an agent's reliance does *not* render the principal's knowledge irrelevant. To the extent that they do still press reliance-by-agent, however, we note that the principal's knowledge is fully as relevant when the "agent" is the Court (Judge Wynn) as it is when the agent is Plaintiffs' Settlement Counsel in the 1998 MedPartners Securities Litigation. In either case, if the principal knew the facts then s/he cannot recover, even if the agent was deceived. The purpose of this section is to point out that reliance-by-agent faces an additional obstacle when the agent is said to be the Court (*see* Pl. Pre-Hearing Br. 97-99, 106; Tr. 131), rather than counsel, because the Court simply is not the "agent" of the class.

According to Plaintiffs, because the principles of agency law govern fiduciary relationships, proof that the court relied on Defendants' alleged misrepresentations or suppression is a sufficient substitute for proof of each class member's individual reliance. (*Id.*) That argument is unavailing, however, because the court does not serve as the class's "agent" for purposes of a fraud claim.

Although the court's role in protecting the interests of absent class members when approving class action settlements has often been described as "fiduciary" in nature,[11] the court when serving this function is *not* a "fiduciary" in the traditional sense. Rather, in protecting the interests of absent class members, the court is serving a judicial function, not acting as the class's agent for purposes of reliance in potential fraud claims. Indeed, even scholars who write about and endorse the concept of the "court as fiduciary" in class actions are careful to note that the role is *not* derived from or governed by the principles of agency, as Plaintiffs and Professor Rubenstein claim. Thus:

> [T]he description of the judge as a fiduciary [in class actions] is incongruous with basic principal-agent relationships usually indicative of such duties. Judges are not agents of plaintiffs, traditionally conceived. There is neither a contract nor a pledge of loyalty to plaintiffs; if anything, they act on behalf of the state and larger civil society. Chris Brummer, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 Colum. L. Rev. 1042, 1064 (2004).

Likewise:

> [The] conception [of the judge as fiduciary in class actions] flows not from the kind of principal-agent relationship that usually underlies imposition of fiduciary duties, but, rather, from the court's role as the governmental institution with make-or-break power over the class action enterprise. Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1707-08 (2008).

When judges approve class action settlements, they are serving a traditional judicial function, not acting as "agents" for the class. *See In re Lupron Marketing and Sales Practices Litigation*, 677 F.3d 21 (1st Cir. 2012) (calling "approv[al] [of] class action settlement agreements" under Rule 23(e) a "traditional judicial function"); *In re Art Materials Antitrust Litiga-*

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11 *See*, *e.g.*, *United States* v. *City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980) (referring to "the court's role as a fiduciary serving as guardian for the unrepresented class members"), *modified on reh'g*, 664 F.2d 435 (5th Cir. 1981); *In re Cendant Corp. Litigation*, 264 F.3d 201, 231 (3d Cir. 2001) ("Under Rule 23(e), the District Court acts as a fiduciary guarding the rights of absent class members and must determine that the proffered settlement is fair, reasonable, and adequate.") (internal quotation marks omitted).

tion, 100 F.R.D. 367, 371 (N.D. Ohio 1983) (comparing role of court in approving class action settlement to role of bankruptcy court in evaluation of reorganization plan, deeming the independent evaluation of such settlement part of "the nature of the judicial function").[12] Even Professor Rubenstein recognizes in his academic writing that the court's involvement in class actions is essentially judicial in nature. *See* William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1468-70 (2006) (noting that Rule 23(e) inquiries involve "a familiar judicial function" and "nothing . . . that is foreign to the judicial function, per se").

Any other conclusion would lead to impossible results. If, for example, a plaintiff attempts to establish reliance in a fraud claim based on the reliance of his/her fiduciary, the defendant in that claim normally would be entitled to depose and cross-examine the fiduciary regarding the alleged reliance. But in this case, that fiduciary would be a judge, making that testimony impossible.[13] Likewise, if the court were truly acting as the agent of the class in the traditional sense, then absent class members would be entitled to sue judges for breach of fiduciary duty — rather than seeking to reverse the judgment on appeal or vacate it pursuant to Rule 60(b) — whenever judges fail to fulfill their duties under Rule 23(e) to ensure that a proposed settlement is fair, reasonable, and adequate. Of course, the doctrine of judicial immunity bars such

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12 That judicial function can be traced directly to procedural requirements in courts of equity, which were especially concerned with ensuring fairness for parties at the risk of injustice. *See* Manual for Complex Litigation (Fourth) § 21 at 243-44 (2004) ("Equity courts created class action procedures to manage group litigation fairly and efficiently. . . . The court must protect the interests of absent class members, and rule 23(d) gives the judge broad administrative powers to do so, reflecting the equity origins of class actions."); *see generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 968 (1987) (describing historical equitable procedures as "permitting the Chancellor, with a good deal of discretion, to order what was fair and just"); *Ortiz* v. *Fibreboard Corp. et al.*, 527 U.S. 815, 832-33 (1999) (tracing history of class actions directly from courts of equity to FED. R. CIV. P. 23).

13 "[A] judge may not be compelled to testify concerning . . . the reasons that motivated him in the performance of his official duties," and "the mental processes employed in formulating the decision may not be probed." *Adkins* v. *State*, 930 So. 2d 524, 546 (Ala. Crim. App. 2001), *aff'd sub nom.*, *Ex parte Adkins*, 639 S. 2d 522 (Ala. 1994).

actions from going forward.[14] Ordinary legal mechanics would break down if judges were treated as ordinary fiduciaries, and that is because judges are ***judges***; they are *not* ordinary fiduciaries when approving class action settlements.

Alleged concealment from the judge by the parties or their lawyers during a court's inquiry into the fairness of the proposed class action settlement falls exclusively under a fraud-on-the-court theory pursuant to Rule 60(b). Confronted with behavior that "defiles or attempts to defile the court itself," a court may upon motion set aside its previous judgment as a fraud upon the court. *Christian* v. *Murray*, 915 So. 2d 23, 28 (Ala. 2005); ALA. R. CIV. P. 60(b). As the Alabama Supreme Court made clear in this case, however, Plaintiffs are *not* advancing a Rule 60(b) argument, *see Ex parte Caremark*, 956 So. 2d at 1117, 1125, and the time to do so has long since passed. Plaintiffs cannot now attempt to rely on the notion that the Court was the "agent" of the class to avoid consideration of the individual reliance issues that are essential to this case.

3. Plaintiffs Have Failed To Show That the Laws of Different States Will Not Govern the Fraud Claims

We showed in our Pre-Hearing Memorandum that the proposed nationwide class also fails to satisfy the predominance requirements of Rule 23(b)(3) because, under Alabama's well-settled choice-of-law principles, the Court would be required to apply differing and conflicting laws from differing states to adjudicate the claims. (Def. Pre-Hearing Br. 35-38 (citing authority)) At the Hearing, Plaintiffs argued without case support that Alabama law applied to all prospective claims because: (i) the class was created in Alabama, (ii) an Alabama court in Alabama relied on the representations, and (iii) the tort was completed in Alabama by entry of the

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14 *See*, *e.g.*, *Lewis* v. *Green*, 629 F. Supp. 546, 549, 552-53 (D.D.C. 1986) (dismissing claims against judge based on approval of class settlement and consent decree); *Vaughn* v. *Webb*, 911 S.W.2d 273, 274-75 (Ky. Ct. App. 1995) (actions of judge in approving settlement of trust constituted "judicial acts" and are covered by absolute judicial immunity); *Hensley* v. *Alcon Laboratories, Inc.*, 197 F. Supp. 2d 548, 550 (S.D. W. Va. 2002) ("A judge facilitating settlement negotiations . . . is performing an official duty" and absolute judicial immunity applies).

final judgment approving the settlement in Alabama. (Tr. 141-42) But those are not the relevant inquiries under the standard Alabama choice-of-law principles governing fraud cases.

Alabama courts apply *lex loci delicti* to fraud cases, so the governing law is the law of the state where the injury occurred. *E.g.*, *Fitts* v. *Minnesota Mining & Manufacturing Co.*, 581 So. 2d 819, 820 (Ala. 1991). The state where the injury occurred is defined under Alabama law as the state in which the plaintiff suffered the economic impact, *e.g.*, *Glass* v. *Southern Wrecker Sales*, 990 F. Supp. 1344, 1348 (M.D. Ala. 1998), *aff'd*, 163 F. 3d 1361 (11th Cir. 1998), and that is generally the state of plaintiff's residence or principal place of business, *e.g.*, *Reibling* v. *Thermo Credit, L.L.C.* (*In re Trinsic, Inc.*), 2008 WL 2115336, at *3 (Bankr. S.D. Ala. May 19, 2008) (applying Louisiana law to fraud claims because the allegedly defrauded party was located in Louisiana, all of its banking was transacted in Louisiana, and all of its principals who may have suffered financially from the claims resided in Louisiana). Here, the putative class includes members residing in all fifty states, so the laws of all fifty states will have to be considered to evaluate the proposed class members' claims.

Plaintiffs also claim that Alabama law applies to "every class member" (Tr. 141) because: (1) that the Stipulation of Settlement requires Alabama law to apply to all putative class members' claims (Tr. 142-43); and (2) that Defendants waived the choice-of-law issue because they failed to give timely notice that they were raising an issue concerning the law of another state under ALA. R. CIV. P. 44.1 (Tr. 140-41). Neither argument has merit.

(a) *Lex Loci Delicti* Continues To Govern the Fraud Claims Notwithstanding the Choice-of-Law Clause

Plaintiffs' argument about the Stipulation of Settlement fails because the provision on which Plaintiffs rely does not apply to the claims in this case — which rest on fraud in the inducement. The provision in question is Paragraph 8.14, which provides:

> This Stipulation and the Exhibits hereto shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of Alabama, and the rights and obligations of the Parties to this Stipulation shall be construed and enforced in accordance with the laws of the State of Alabama without giving effect to that State's choice of law principles. (Ex. 39 ¶ 8.14)

The provision thus applies on its face to the Parties' rights and obligations *under the Stipulation of Settlement*. Where, as here, the claim is for *fraudulent inducement* of a contract containing a choice-of-law clause, Alabama continues to apply *lex loci delicti* to the fraud claim even though it would honor the choice-of-law clause in a claim for breach of contract. *Williams* v. *Norwest Financial Alabama, Inc*., 723 So. 2d 97, 101 (Ala. Civ. App. 1998) ("[T]he choice-of-law clause does not supersede the rule of 'lex loci delicti.'"); *Branch Banking & Trust Co*. v. *Syntellect, Inc*., 2010 WL 2947772, at *4, *9 (M.D. Ala. July 22, 2010) (Arizona law applies to breach of contract claim pursuant to choice-of-law clause, but Alabama law applies to fraud claim pursuant to *lex loci delicti*).

(b) Defendants' Assertion That Choice-of-Law Issues Preclude Class Certification Is Timely

Plaintiffs' argument that Defendants waived the choice-of-law issue because they did not give timely notice under ALA. R. CIV. P. 44.1 fares no better. In fact, Rule 44.1 is not implicated here at all. Rule 44.1 provides:

> A party who intends to raise an issue concerning the law of another state or of any territory or dependency of the United States or of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining such law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Alabama Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Rule 44.1 does not bar consideration of the multiple-state issue here for several reasons.

First, all of the *named* Plaintiffs are Alabama residents, so there was and is no basis to raise choice-of-law as to them in Defendants' Answers.

Second, Defendants have *not* now asked this Court to apply the law of another state as to any claim by any plaintiff but have simply raised the fact that Plaintiffs' attempt to certify a nationwide fraud class *will* necessitate such a choice-of-law determination for each individual putative class member before the merits can be decided. The Court will not decide which states' laws apply to any particular claim at this class certification stage and will not be required to make that determination until the merits are heard on a particular class member's claim. Because Defendants merely point out that this determination will need to be made — and that, under Alabama choice-of-law principles, will surely require individualized inquiries that result in conflicting laws applying for different putative class members' claims — the notice provisions of Rule 44.1 are not yet implicated at all.

Third, even if Rule 44.1's notice requirement were triggered, Defendant's notice is timely. The Court will not decide which states' laws apply until the merits stage; thus the parties have ample time to prepare any materials necessary to submit to the Court to aid its decision on the merits. The cases generally find that there is no waiver even when notice is given at a time much later in the proceedings than it has here. *See Cherokee Insurance Co.* v. *Sanches*, 975 So. 2d 287, 295 (Ala. 2007) (reasonable notice where defendant filed a notice of determination specifically asserting the foreign law 32 days before the scheduled trial date); *see also Shelter Mutual Insurance Co.* v. *Barton*, 822 So. 2d 1149, 1155 n.5 (Ala. 2001) (reasonable notice where the party notified the trial court and the other parties in its motion for summary judgment, which was filed over one month before the trial of this case, of its intention to argue that Missouri law applied).

Finally, regardless of Rule 44.1's notice requirement, the Alabama Supreme Court has made clear that the Court has an independent duty, as part of the requisite "rigorous analysis," to investigate the choice-of-law issue. Indeed, in this very case, the Alabama Supreme Court has cited with approval the following holding of *Ex parte Green Tree Fin. Corp.*, 723

So. 2d 6, 10-11 (Ala. 1998): "In determining whether the questions of law or fact common to the class members predominate over those questions that affect only individual class members, the court must initially identify the substantive law applicable to the case and identify the proof that will be necessary to establish the claim." *Ex parte Caremark*, 956 So. 2d at 1126.

Of course, the burden is on Plaintiffs to show that individual issues will not predominate on account of choice of law issues. Plaintiffs have not even attempted to do that. Rather, Defendants have affirmatively demonstrated that, under Alabama's choice-of-law principles, the alleged injuries in this case likely occurred in all fifty states, and the conflicting laws of differing states will therefore likely apply to the claims and defenses in this case, ensuring that individual issues predominate.

B. Certification Is Improper Under Rule 23(b)(1)(A)

As discussed fully in our Pre-Hearing Memorandum (at 21-27), Plaintiffs' argument for certification under 23(b)(1)(A) fails for three reasons. First, Rule 23(b)(1)(A) applies only to cases involving an impact on the prospective conduct of the party opposing the class, which is not the case here. Second, Plaintiffs' argument for certification under Rule 23(b)(1)(A) fails because Rule 23(b)(1) is limited to circumstances, not at issue here, in which a defendant's conduct towards each of the proposed class members *must* be the same, *i.e.*, that a defendant simply *cannot* comply with inconsistent adjudications. Third, under both Alabama Supreme Court and United States Supreme Court precedents, Rule 23(b)(1)(A) is simply unavailable in actions, such as this one, that primarily seek money damages.

At the Hearing, Plaintiffs did not address the Rule 23(b)(1)(A) authority raised in Defendants' memorandum of law. In fact, by acknowledging that certification under Rule 23(b)(1) in this case "would be a departure from the ordinary use of (b)(1)" (Tr. 143), Plaintiffs effectively concede that the case law does not support their position. What Plaintiffs fail to do, however, is to explain why such a "departure from the ordinary" is warranted in this case. Nor can they.

Rule 23(b)(1)(A) provides for certification where:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . .

A requirement for Rule 23(b)(1)(A) certification, therefore, is that there be an impact on the prospective conduct of the party opposing the class — in other words, that "different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct." *1 McLaughlin on Class Actions* § 5.2. Here, Plaintiffs have failed to show that this action will in any way impact Defendants' ability to pursue a "uniform course of conduct." In fact, Plaintiffs do not even attempt to make such a showing.

Plaintiffs are right that this is not the "typical case" in which Rule 23(b)(1)(A) applies. In fact, it is not *any* kind of case to which that Rule applies. According to the Alabama Supreme Court, such cases involve a risk that prospective continuing conduct of the defendant that needs to be uniform will be disrupted by inconsistent adjudications if a class action is not permitted. *See Ex parte GEICO*, 729 So. 2d 299, 306 (Ala. 1999). The "classic example" highlighted by the Court in *Ex parte GEICO* is one in which several individuals want to sue a municipality in connection with a bond issue, with "some individuals wishing to invalidate the issue, others to limit it, and still others to enforce interest payments under the bonds. If one group succeeded in invalidating the bond issue and another succeeded in getting judgments ordering payment of the interest, the municipality would have incompatible standards with regard to the bond issue." *Id*.

This is not such a case, and Plaintiffs do not claim otherwise. Plaintiffs cannot show that there would be any impact on Defendants' ability to pursue a "uniform course of conduct" if individual suits were to proceed in this case, because Plaintiffs' only claims here are for money damages. And the Alabama Supreme Court expressly held in *Funliner of Alabama, L.L.C.* v. *Pickard*, 873 S. 2d 198, 207 (Ala. 2003), that money damages claims are *not* appropriate for class certification under Rule 23(b)(1)(A). Furthermore, the United States Supreme Court has held that, because cases certified under Rule 23(b)(1) do not allow absent class members notice of the suit and an opportunity to opt-out, due process precludes certification under Rule 23(b)(1) of claims that are predominantly for money damages. *Dukes*, 131 S. Ct. at 2559.

Plaintiffs provide no basis for distinguishing *Funliner* or *Dukes*. Rather, at the Hearing, they urged this Court to ignore the law and to "give the Alabama Supreme Court the ability to at least look at this issue and decide for itself [if] the unique facts of this case give rise to a unique (b)(1) remedy." (Tr. 144) But that is no basis for finding the requirements of Rule 23 satisfied. In any event, the Alabama Supreme Court will get the opportunity to "decide for itself" whether certification under Rule 23(b)(1) is appropriate in this case, regardless of what this Court decides. Under Ala. Code § 6-5-642, there is a direct right of appeal not only from orders granting class certification but also from orders refusing to certify.

This Court is simply not free to ignore controlling precedent that Plaintiffs have not even attempted to distinguish, and it should decline Plaintiffs' invitation to do so. For all of Plaintiffs' assertions about the "uniqueness" of this case, they do not once contend that it is a case that requires some uniform prospective conduct on the Defendants' part. Nor do they deny that this is a case that is predominantly for money damages. In light of *Funliner* and *Dukes*, that is the end of the matter.

C. Plaintiffs Have Not Moved for Certification Under Rule 23(b)(1)(B), and Any Such Motion Would Fail in Any Event

Plaintiffs Motion for Class Certification is based on "Rule 23(b)(1)," but the brief in support of the motion cites and discusses only Rule 23(b)(1)(A). Rule 23(b)(1)(B) is never so much as mentioned in either the motion or the brief. In their opening statement at the Hearing, however, Plaintiffs never cited either subdivision (A) or (B), referring throughout only to "Rule 23(b)(1)." (*E.g.*, Tr. 144, 146, 147, 149) Nevertheless, counsel quoted (without saying that he was doing so) from Rule 23(b)(1)(B) (Tr. 146-47), and it appears that Plaintiffs may be attempting to do an after-the-fact shift of position. Any such effort should be rejected.

In the first place, of course, Plaintiffs should be held to the issues they briefed. This is their motion, and it is their burden to establish each of the elements needed for certification. After 8-1/2 years of litigation, they filed a 155-page brief that set out their view as to the steps the Court should take in the statutorily mandated "rigorous analysis." The two subdivisions of Rule 23(b)(1) are completely distinct bases for certification, and Plaintiffs' brief addressed only Rule 23(b)(1)(A). Plaintiffs cannot now change course (if that is in fact what they are doing), having never provided the Court (or Defendants) with authority or argument for why Rule 23(b)(1)(B) applies. The Court simply cannot do the required "rigorous analysis" based on a three-line comment in an opening statement. For that reason alone, certification under Rule 23(b)(1)(B), if in fact now being sought, is due to be denied.

But even if Rule 23(b)(1)(B) were properly before the Court, certification on that basis must be denied. The Rule provides:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) . . .
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of

> the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

On the face of the Rule, it does not apply here. Rule 23(b)(1)(B) is designed to protect absent class members from having their interests precluded without their being present (or represented). *See Dobson* v. *Hartford Life & Accident Insurance Co.*, 2006 WL 861021 (D. Conn. Mar. 31, 2006), *aff'd sub nom. Dobson* v. *Hartford Financial Services Group, Inc.*, 342 Fed. App'x 706 (2d Cir. 2009); *In re Paxil Litigation*, 212 F.R.D. 539, 553 (C.D. Cal. 2003); *1 McLaughlin on Class Actions* § 5.8. Here, however, no judgment in any one claim against Defendants can have *any* negative effect on any absent class member: a judgment for plaintiff *may* give absent class members the benefit of offensive collateral estoppel,[15] but a judgment for Defendants would not affect the absent class members in the slightest. Further, the law is clear that the mere "possibility that an individual suit 'will have either precedential or stare decisis effect on later' claimants does not justify (b)(1)(B) class certification." *1 McLaughlin on Class Actions* § 5.8; *accord* 2 William Rubenstein, *et al.*, *Newberg on Class Actions* § 4:10 (4th ed. 2012). The plaintiff-protective predicate for application of the Rule has not been met. Under *any* analysis of Rule 23(b)(1)(B), let alone the requisite rigorous analysis, certification must be denied.

Because Plaintiffs have not cited *any* authority concerning Rule 23(b)(1)(B), it goes without saying that they have cited no authority that supports their position. In *Ex parte GEICO*, the Alabama Supreme Court rejected certification of a fraud claim under Rule 23(b)(1)(B), noting that "[c]lass suits seeking damages exclusively are prime candidates for Rule 23(b)(3) classes." 729 So. 2d at 306.[16]

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15 Obviously, Defendants do not agree that it *would* do so, but they recognize the possibility that future plaintiffs might argue otherwise.

16 There is a line of cases in other jurisdictions suggesting that Rule 23(b)(1)(B) certification might be appropriate where multiple punitive damages claims might bankrupt the defendants, leaving subsequent claimants with no assets to execute against, but the Alabama Supreme Court rejected that concept as impractical in *Ex parte Holland*, 692 So. 2d 811, 821 (Ala. 1997) (reversing certification under Rule 23(b)(1)(B) as an abuse of discretion). And, in any event, Plaintiffs here have not even attempted to make the kind of detailed financial showing that the Supreme Court held in

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Once again, Plaintiffs look past the text of the Rule, look past the cases, and look past the needed "rigorous analysis" to reach their old standby — the "class entity." At the Hearing, Plaintiffs submitted that their "one theory" for certification under (b)(1) is that: "a class once certified becomes a separate legal entity, separate and independent from the individual class members[,] an entity like a corporation." (Tr. 144) They argue that:

> So if you have a single entity that was defrauded, then that's the single entity that's the plaintiff in this case. . . . [I]f the class itself is what was defrauded, then we say by logical definition, individual class members can't litigate that claim. So the class litigat[es] that fraud claim and either wins or loses, you can't have individual members litigating that same claim. If they did, they would have to prove the class was defrauded. . . . if an individual class member brought an individual case, the issue would be or all the evidence would be . . . was the class defrauded. (*Id.*)

For all the reasons set forth above, this argument is a non-starter. Even had the Supreme Court not rejected the concept in this case in 2006, it could not possibly apply under Rule 23(b)(1)(B). It has no foundation in the words of the Rule, and Plaintiffs have not tried to find any. The "rigorous analysis" that the Court is required to conduct under ALA. CODE § 6-5-641 is of "all factors required by Ala. R. Civ. P. 23 for certification of a class," and that requires rigorous adherence to the criteria actually set forth in the Rule — not on the Plaintiffs' wish list. The statute is explicit: The court "*shall not order certification* unless all such factors shall have been established."

Finally, and in any event, the *evidence* in this case shows that the putative class is *not* a uniform, monolithic entity whose claims rise or fall on the same facts. (*See* Point I.A.2(a) *supra*) For all these reasons, certification under Rule 23(b)(1)(B), if in fact being sought, is due to be denied.

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Holland would be the minimum for even considering such certification.

II.

PUTATIVE CLASS COUNSEL FAIL THE ADEQUACY REQUIREMENT OF RULE 23(A)(4)

Before the Hearing, Defendants set forth several reasons why Putative Class Counsel cannot meet the adequacy requirement of Rule 23(a)(4) because of problems arising from (i) their involvement in the underlying securities litigation at issue in this case (Def. Pre-Hearing Mem. 41-59, 69-72); (ii) the representation of MedPartners' former General Counsel J. Brooke Johnston (Def. Pre-Hearing Mem. 59-65); and (iii) their actions in this case (Def. Pre-Hearing Mem. 65-69). Testimony at the Hearing, especially that of Putative Class Counsel, further highlighted these difficulties.

There is *no* presumption of adequacy. (Def. Pre-Hearing Mem. 40) Due to Putative Class Counsel's conflicts of interest and prior ethical violations in this and the underlying securities case, "realism requires that certification be denied." *Culver* v. *City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002); *Gomez* v. *St. Vincent Health, Inc.*, 649 F.3d 583, 592-93 (7th Cir. 2011); *accord*, *e.g.*, *Lewis* v. *National Football League*, 146 F.R.D. 5, 12 (D.D.C. 1992). As Plaintiffs' own expert, Dean Randall, conceded at the Hearing, the Court must take these types of issues into account when analyzing adequacy under Rule 23. (Tr. 400-01)

A. The Hare Wynn and North Firms Did Not Fulfill Their Duties to the Settlement Class During the 1998 MedPartners Securities Litigation

When the Hare Wynn Firm and North Firm filed their initial class action complaint in *Lauriello* v. *MedPartners, Inc., et al.*, CV-98-98 (Jefferson Co. Circuit Court) ("*Lauriello I*"), on January 9, 1998 (FPFF ¶ 36), those attorneys voluntarily undertook a fiduciary duty with regard to the class they sought to represent. As Professor Rubenstein testified:

> In a class action, . . . the attorney, as class counsel, has a duty to the entire class, not just to the individual class representative . . . . And so, although in filing a putative class, you haven't been appointed by a court to be their class representative in that regard, you'd still have those larger duties. (Rubenstein 134-35)

These responsibilities endured through July 10, 1999, when Judge Wynn issued his Order and Final Judgment. (Rubenstein 138-39; Ex. 128). Dean Randall agreed that the Hare Wynn Firm and North Firm had an obligation to fulfill their duty to the class to make sure the settlement was fair, even though *Lauriello I* had been dismissed and was on appeal. (Tr. 405-06) So did Mr. Pearson. (Pearson 30-31, 222-23; Ex. 214 ¶ 4.1)

At the very core of the Hare Wynn and North Firms' responsibilities to the 1998 MedPartners Securities Litigation class was their duty to ascertain the fairness of the proposed settlement. (Rubenstein 160) Mr. Francis readily admitted that he had a duty, both as a lawyer representing an individual client in the 1998 MedPartners Securities Litigation and given his continuing duties and obligations to the class he had been seeking to represent, to investigate the fairness of that settlement. (Tr. 730-31) Mr. Haley, likewise, admitted that if insurance is an issue then a representative of a class has a duty to find out the amount of insurance available to settle a matter if an amount is going to be represented to the Court: "If you are going to represent to the Court the amount of insurance, then lawyers have a responsibility to find out what it is." (Tr. 626) Thus, Plaintiffs failed to rebut — and, in fact, affirmatively agreed with — Defendants' expert Albert M. Pearson, who opined that any attorneys who received compensation as a result of their representation in the 1998 MedPartners Securities Litigation "had an affirmative duty to investigate the fairness of the settlement negotiated by William Lerach in: the eighteen securities class actions pending in federal and state court; the *Padilla* class action in federal court in California; the *McBride* derivative action; and the *Blankenship* individual action pending in MP in Alabama." (Ex. 214 ¶ 4.1; Pearson 30-33)

The evidence about the 1999 settlement in the case at bar paints a picture of a group of attorneys who appeared to be more concerned with legal fees than with fulfilling any duty to the class in connection with the settlement. Putative Class Counsel's involvement in that settlement stands as an insurmountable barrier to class certification.

1. The Hare Wynn and North Firms Have a Material Conflict of Interest Under Rule 1.7 Because Their Conduct in the 1998 MedPartners Securities Litigation Will Be Called into Question at the Trial of This Case

With all of the back and forth in the Hearing about the actions and inactions of the Hare Wynn and North Firms in the 1998 MedPartners Securities Litigation, it is easy to lose sight of the fact that this Court need not ultimately conclude at this point that those firms committed misconduct to conclude that they are inadequate to represent the putative class in this case. Whether this Court believes that those firms committed misconduct by not undertaking any independent analysis to ascertain the fairness of the settlement or doing enough to discover the alleged fraud sooner, or whether it believes that those issues will ultimately be questions for the jury to decide, the reality is that, as the Hearing made clear, for Plaintiffs to establish reasonable reliance in this case and to defend against Defendants' statute of limitations defense, they will need to argue that Plaintiffs' counsel in the 1998 MedPartners Securities Litigation should not have known sooner about the existence and extent of the excess insurance available to pay for any settlement or judgment in that case. Defendants will argue that Plaintiffs' counsel were more concerned about their fees than with doing the diligence that they were required to do in that case. That issue — whether the plaintiffs' law firms involved in the 1998 MedPartners Securities Litigation did enough to satisfy their obligations to the class — will be a central merits issue in this case. (Pearson 37-38; Ex. 214 ¶ 5)

Because the Hare Wynn and North Firms' prior actions (or inactions) in the 1998 MedPartners Securities Litigation will be a central issue in dispute in this case, those firms have a material limitation conflict under Alabama Rule of Professional Conduct 1.7. *See* ALA. R. PROF. CONDUCT 1.7 cmt ("If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."); *George* v. *McClure*, 266 F. Supp. 2d 413, 419 (M.D.N.C. 2001) (in suit alleging fraud in settlement of prior litigation, disqualifying defendant's counsel under, among other things, North Carolina Revised Rule of Professional Conduct 1.7, because "[counsel] was involved in the settlement process and allegedly was aware of misrepresentations made by others and made misrepresentations himself in that context"). Professor Morgan explained the rationale behind this "core" adequacy issue:

> [W]hen your work on behalf of the class is going to be also involving statements about assessments of your own performance in the matter, you don't have the professional distance that allows you to be objective and be effective in really pursuing the interest of the class. That professional distance idea is an important one. (Tr. 869-70)

Defendants' other expert, Mr. Pearson, put it this way:

> [C]redibility would be an inherent issue in the case, insofar as fraud is concerned . . . in terms of what [they] knew and didn't know, what [they] did and didn't do; on whom [they] relied, if [they] did not independently do investigation after the settlement had [been] reached to confirm that the basis for settlement was — was fair. All of these factual issues that would be subject to — to inquiry. And so in my opinion that would put [their] credibility before the jury. And that by virtue of that fact — that weighs against accepting your law firm as — or the current counsel as class counsel. (Pearson 21-22)

In short, the reputations of the Hare Wynn and North Firms will be at stake in this case when the merits are litigated. Even if Putative Class Counsel ultimately persuade the trier of fact that they and their co-counsel for the plaintiffs in the underlying securities case *did* do enough to investigate the fairness of the settlement and the amount of insurance available to cover any settlement or judgment, *the very fact that they will need to litigate that issue presents a conflict for them.*

2. The Hare Wynn and North Firms Did Not Ascertain the Fairness and Adequacy of the Settlement

Although this Court can conclude that the Hare Wynn and North Firms are conflicted without actually ruling on whether those firms violated their duties to the class in the 1998 Med-

Partners Securities Litigation by failing to investigate the fairness of the settlement and the amount of available insurance, the evidence is clear that they *did not fulfill* those duties.

Plaintiffs' class action expert Professor Rubenstein concedes that, because the Hare Wynn and North Firms accepted a substantial fee in the underlying securities litigation, they owed a duty to the settlement class to determine the fairness and adequacy of the settlement. (Rubenstein 159-61) *Accord Schick* v. *Berg*, 2004 WL 856298, at *6 (S.D.N.Y. April 20, 2004), *aff'd*, 430 F.3d 112 (2d Cir. 2005); 3 William B. Rubenstein, *et al.*, *Newberg on Class Actions* § 7:28 (4th ed. 2012) (noting duty of class representatives to adequately protect the interests of the class upon filing a complaint in a proposed class action). Gene Cauley, who was appointed co-counsel to the settlement class, agreed. (Cauley 322-24) So did Mr. Pearson. (Pearson 30-32)

As demonstrated in our Pre-Hearing Memorandum (at 42-48, 54-56), the Hare Wynn and North Firms did nothing other than attend two hearings to meet their obligations to the settlement class to investigate the fairness of the settlement. The evidence at the Hearing amply confirmed this conclusion:

- Mr. Haley never asked Milberg Weiss for copies of any of MedPartners' insurance policies and never confirmed whether any plaintiffs' counsel had even received copies of any insurance policies. (Tr. 617)
- Mr. Haley never confirmed whether Milberg Weiss or any other plaintiffs' counsel was undertaking confirmatory discovery. (Tr. 617)
- Mr. Haley never undertook any confirmatory discovery himself. (Tr. 617-18) Rather, he simply sat in Court and listened to what other lawyers had to say about the settlement. (Tr. 621)
- Mr. Haley never asked Messrs. Lerach, Selinger, or Cauley, or otherwise attempted to ascertain, whether they fulfilled plaintiffs' duty to find out what the amount of insurance was. (Tr. 626)
- Mr. Haley did not review MedPartners' public SEC filings and press releases concerning MedPartners' insurance coverage and ability to pay, notwithstanding that he conceded that (i) it is a good practice to do so and (ii) plaintiffs and their counsel are charged with knowledge of the contents of such disclosures in securities cases. (Tr. 606)

- After being told by Clay Ragsdale that the 1998 MedPartners Securities Litigation had settled for the "policy limits and some" (Tr. 717), and despite not having personal knowledge of the policy limits available, Mr. Francis did not ask Mr. Ragsdale (i) what he meant by "policy limits" or (ii) what diligence he performed to learn about the policy limits (Tr. 719-20).
- Mr. Francis did no independent work or research to evaluate or assess the adequacy of the settlement between the time he learned of it and the May 3, 1999 preliminary fairness hearing, nor is he aware of any such work performed by Mr. North. (Tr. 723)
- Mr. Francis knows of no plaintiffs' attorney who made a request to MedPartners or its attorneys to review documents in connection with the settlement at any time between January 15, 1999 — the date the Memorandum of Understanding was signed — and the May 3, 1999 preliminary fairness hearing. (Tr. 725-26)
- Between the time he learned of the settlement and its final approval in July 1999, Mr. Francis never had any discussions with Messrs. Cauley or Selinger about the amount of insurance coverage that was available. (Tr. 743)
- Mr. Francis never conversed with any MedPartners lawyer, employee, insurer, or agent about the amount of insurance coverage that was available. (Tr. 752)

After learning about a proposed class action settlement from which they stood to receive a substantial fee, neither the Hare Wynn Firm nor the North Firm ever asked anybody whether or why the proposed settlement was fair and reasonable. They had not followed the company's public announcements. They did not know how much insurance was available or even whether anyone else had done anything to determine how much insurance was available. They did not ask for confirmatory discovery. They did not ask whether anyone had copies of all of the insurance policies. They did not ask about anything — except about their share of the attorneys' fees. Counsel's only comeback is that they showed up and listened at the two fairness hearings. (Tr. 755-56) But that is not enough. Diligence is not what counsel does by *attending* a fairness hearing; diligence is what counsel should do *in preparation for* a fairness hearing to have an independent basis to weigh, consider, and evaluate what transpires at the hearing.

The Hare Wynn Firm and North Firm suggest that there was nothing more that they could have done by way of diligence. They do not dispute, however, that they had every right, under the terms of their Joint Prosecution Agreement with Milberg Weiss, to instruct Milberg Weiss to perform confirmatory discovery. (Tr. 716) They never did so. (Tr. 617) And although

Putative Class counsel suggest that they could not have performed confirmatory discovery themselves because the *Lauriello I* case was on appeal at the time of the settlement (Pl. Pre-Hearing Br. 48; Tr. 594, 710-11), they fail to acknowledge that dismissal of the *Lauriello I* appeal was an express condition to the settlement becoming final, which provided the Hare Wynn and North Firms with veto power over the settlement if, for any reason, they were not satisfied with the information they were able to collect regarding the fairness of the settlement. Putative Class Counsel also fail to address *any* of the cases cited in our Pre-Hearing Memorandum (at 46) making clear that confirmatory discovery is routinely permitted when class actions settle while a case is pending on appeal.[17] Indeed, even Dean Randall concedes that plaintiffs' counsel in the underlying action could have performed confirmatory discovery prior to the Court's approval of the settlement (Tr. 456), and that the Hare Wynn Firm and North Firm had an obligation to fulfill their duty to the class to make sure the settlement was fair, even though *Lauriello I* had been dismissed and was on appeal (Tr. 405-06).

The Hare Wynn Firm and North Firm also suggest that they could not conduct any confirmatory discovery in the 1998 MedPartners Securities Litigation because they were never appointed class counsel. (*See*, *e.g*., Pl. Pre-Hearing Br. 2 n.2) That argument fails for two reasons. First, the evidence at the Hearing confirmed what the cases cited in our Pre-Hearing Memorandum had already established — counsel for a plaintiff in a class action *may* participate in confirmatory discovery, even if they are not appointed class counsel. Indeed, Mr. Somerville testified that he has personally performed significant confirmatory discovery — including taking

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17 *See*, *e.g*., *In re Insurance Brokerage Antitrust Litigation*, 2009 WL 411877, at *7 (D.N.J. Feb. 17, 2009) (confirmatory discovery conducted for settlement of class action alleging antitrust and other violations while the case was pending appeal from an order to dismiss); *In re Merrill Lynch & Co. Research Reports Securities Litigation*, 2007 WL 313474, at *16 (S.D.N.Y. Feb. 1, 2007) (confirmatory discovery conducted for settlement of securities class action while the case was pending appeal from an order to dismiss); *In re Bristol-Myers Squibb Securities Litigation*, 361 F. Supp. 2d 229, 235 (S.D.N.Y. 2005) (confirmatory discovery conducted for settlement of securities class action while the case was pending appeal from an order to dismiss).

depositions, serving document requests, reviewing documents that were produced, and performing expert discovery — in an action where he was not class counsel. (Tr. 1043-45) Second, as conceded by Mr. Francis at the Hearing, both the Hare Wynn and North Firms had the right under the Joint Prosecution Agreement to insist that Milberg Weiss do whatever confirmatory discovery needed to be done and the leverage under the Settlement Agreement to ensure that their request was satisfied. (Tr. 716)

Plaintiffs also speculate that any attempt to ask Defendants about the excess coverage would have been futile because, in Plaintiffs' view, Defendants would likely have lied about it. (Pl. Pre-Hearing Br. 48 n.35, 54-55) This is purely self-serving conjecture. There is no evidence that Defendants failed to respond to a specific request of any plaintiffs' counsel regarding the amount of insurance potentially applicable to the settlement of the 1998 MedPartners Securities Litigation. In any event, Plaintiffs' speculation cannot satisfy the duty of plaintiffs' counsel to investigate the fairness of the settlement. Perhaps nobody expressed this point more clearly than John Haley at the Hearing. According to Mr. Haley, "if you're going to represent to the court the amount of insurance, then lawyers have a responsibility to find out what [that amount] is." (Tr. 626)

The bottom line is this: Plaintiffs' counsel in the underlying securities litigation knew there was an excess insurance policy. (Tr. 605-07; FPFF ¶¶ 150, 364-65) They knew, because of the public filings and press releases that we now know they read and on which they focused. (Pl. Pre-Hearing Br. 50-51; Cauley 195-96) Indeed, the importance of the excess insurance policy issue was even flagged for them by Messrs. Toll and Squitieri, almost three months *before* anyone said anything to Judge Wynn at the preliminary fairness hearing. (FPFF ¶¶ 203-07) As class counsel Gene Cauley candidly admitted, "it was important that someone, at a minimum, someone from my lawyers' constituency from my case, have their hands on the actual policy." (Cauley 195) And as Mr. Haley also conceded at the Hearing, if plaintiffs' lawyers represent to the court the amount of insurance, then they have a responsibility to find out what that amount is. (Tr. 626)

As Defendants' expert Al Pearson made clear, there was no excuse for any of the Plaintiffs' counsel in the underlying securities litigation who stood to receive a fee, including the Hare Wynn and North Firms, not to do whatever was necessary to get their hands on that Policy if the amount of coverage was a driving force behind the decision to settle the cases for $65 million. At the very least, these lawyers should have picked up a phone, called defendants or their counsel, and asked for the information. (Pearson 64) If they did not receive a satisfactory answer, they should have issued a formal document request for MedPartners' insurance policies. (Pearson 66) If no documents were produced, then they should have issued a subpoena for a 30(b)(6) deposition. (Pearson 66) One way or the other, they could make sure they knew about the insurance. As Mr. Pearson testified:

> If anybody had made a request to see the policy alluded to in the press releases and in the securities filings, you either get a copy of the policy or you don't.
>
> There isn't any issue of credibility about that, it's either there or it's not there. And if MedPartners says: We're not going to produce this or simply refuses to produce it, then you've got options, sanctions, or you can just simply back out of the settlement negotiations and go back to square one.
>
> But you're going to find a copy of that policy, because it appears to have existed, and there are ways to get it if you really want to get it.
>
> So there's no doubt about your ability to get it. Now, whether you are going to get a truthful statement from everybody you ask, who knows? Some people may not understand the facts, some people may not know anything about it. But you can find out that policy. (Pearson 72-73)

The lack of independent initiative and action by the Hare Wynn Firm and North Firm throughout the settlement process — notwithstanding their relationship with one of the firms appointed as settlement counsel — is compounded by the fact that plaintiffs' counsel, including the Hare Wynn Firm and the North Firm, *had knowledge of the excess insurance before the settlement was approved.* For example, on April 15, 1999, MedPartners filed its Annual Report on

Form 10-K for 1998 with the United States Securities and Exchange Commission. (FPFF ¶ 76) In its 10-K, MedPartners reported that "in December 1998, the Company agreed to pay a premium of $22.5 million to acquire excess equity protection insurance coverage from National Union Fire Insurance Company of Pittsburgh ("National Union"), pursuant to which National Union assumed financial responsibility for the defense and ultimate resolution of the [1998 MedPartners Securities] Litigation." (FPFF ¶ 78) The Hare Wynn Firm and North Firm are charged with knowledge of the disclosures in the 10-K. As admitted by Mr. Haley before this Court:

> In securities cases, if there is a public disclosure, when a company makes a public disclosure, the shareholders are charged with knowledge of what the company puts out in its financial documents. So they were charged with knowledge of that, or the plaintiffs' lawyers should have been aware of it. And, in fact, we know now that they did know about it. (Tr. 606)

Mr. Haley further conceded that the February 10, 1999 letter from Messrs. Toll and Squitieri to Cauley, Selinger, and Lerach (Ex. 93) was sufficient to put the settling lawyers on notice that, if they really were concerned about the available insurance, they should have contacted MedPartners, its counsel, or its insurers and asked the questions that Messrs. Toll and Squitieri put forth in their correspondence. (Tr. 626)

The inaction and resulting failures in diligence of the Hare Wynn and North Firms to obtain a copy of the excess insurance policy will be a central issue in this case. To represent the putative class in this case, they will need to defend their own actions, as well as the actions of the counsel with whom they chose to associate. That presents a disqualifying material limitation conflict for them, plain and simple.

3. The Hare Wynn and North Firms Are Inadequate Because They Violated Rule 5.4(a) by Sharing Their Fees with John Lauriello

(a) The Payment to Mr. Lauriello Cannot Be Characterized as a Fee Reduction and Required Court Approval

As set forth in Defendants' Pre-Hearing Memorandum (at 48-50), the Hare Wynn and North Firms violated Alabama Rule of Professional Conduct 5.4(a) — which states that "[a] lawyer or law firm shall not share legal fees with a non-lawyer" — by giving John Lauriello over $76,000 (which amounts to more than 30 times his allowed distribution from the settlement) of the 1998 MedPartners Securities Litigation attorneys' fees in order to make him whole.[18] While Putative Class Counsel argue that they merely "reduced" their fee from the underlying action (FPFF ¶ 312; Tr. 657-60, 677-78), Professor Morgan explained why such a characterization is flatly wrong:

> Mr. Lauriello had no fee obligation. He wasn't being charged a fee as a class action plaintiff. He wasn't being charged a fee as an individual plaintiff. . . . [W]hen the fee is zero, it is not a fee reduction to give $75,000 affirmatively to Mr. Lauriello. It's a division of the fee that the firms received, and it's payment to Mr. Lauriello. That payment is clearly a violation of Rule 5.4(a). This is not a hard point. (Tr. 897)

Mr. Francis agreed that the Hare Wynn Firm and North Firm simply took part of the fees that they had been paid out of the class recovery and wrote checks to Mr. Lauriello based on their calculation of his losses. (Tr. 798) Dean Randall likewise admitted that the attorneys' fees received by the Hare Wynn Firm and North Firm came from the class counsel fee awarded to Milberg Weiss, not from John Lauriello. (Tr. 426-27)

If, in fact, the Hare Wynn and North Firms wanted to reduce the amount of their fee, they were obligated to give the portion of their fee back to the entire class. (Morgan Report

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18 Mr. Haley confirmed that John Lauriello is not a lawyer. (FPFF ¶ 312.2)

¶ 9(c); Tr. 897-98) But as Mr. Haley admitted, they did not return any portion of their fee from the 1998 MedPartners Securities Litigation to the class action escrow fund. (FPFF ¶ 322.3; Tr. 164) Thus, Putative Class Counsel's attempt to re-label their fee sharing with John Lauriello does not cure the violation of Alabama's Rules of Professional Conduct. *See* Alabama State Bar, Office of General Counsel Opinion No. 1995-02 ("The Disciplinary Commission does not believe that you can escape Rule 5.4(a) by calling fees for legal work associated with a financial real estate transactions [sic] 'settlement fees' rather than 'attorney's fees.'"). At the time the payments to Lauriello were made, Mr. Haley knew that Rule 5.4(a) prohibited fee sharing, yet he and the North Firm voluntarily chose to make the payment anyway. (*See* FPFF ¶ 312.1)

Furthermore, any extra payment to John Lauriello above his allowed distribution amount required some sort of Court notification or approval. An ethics opinion from the Professional Ethics Committee of the Supreme Court of Texas, which was based on a nearly identical rule to the one at issue here,[19] makes that clear. In Ethics Opinion 526 of the Professional Ethics Committee of the Supreme Court of Texas, a law firm was retained by several plaintiffs who were dissatisfied with the terms of a class settlement that had been reached, and the law firm was successful in procuring a more favorable settlement of the matter. *See* Tex. Comm. on Prof. Ethics, Opinion 526 (1998), 1998 WL 130068, at *1. The law firm did not represent the class as a whole, and the law firms' clients were not named representatives of the class. *Id.* at *1. As part of the new settlement, the court awarded the law firm attorneys' fees taken out of the new class recovery. *Id*. The attorneys, in turn, sought to distribute a portion of their fee award to the plaintiffs who hired them and requested an Ethics Opinion before doing so to determine whether their intended distribution scheme would violate Texas Disciplinary Rule 5.04. *Id.* According to the Ethics Committee, the proposed arrangement would, in fact, violate Rule 5.04. *Id.* at *1-*2.

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19 Rule 5.04(a) of the Texas Disciplinary Rules of Professional Conduct reads as follows: "A lawyer or law firm shall not share or promise to share legal fees with a non-lawyer . . . ."

In so concluding, the Ethics Committee stressed that, among other problems with the arrangement, it violated Rule 5.04 because, in the class action context, the issue of providing additional compensation to any plaintiff out of the amounts awarded to the class was one for the court, and not the law firm to decide. *Id*. at *2. As the Ethics Committee explained:

> In this case, the court's award of attorneys' fees to the law firm was intended to compensate the law firm for the value conferred on the whole class and was not approved as a means of paying the law firm's clients for raising the objection. If the law firm's clients deserved special compensation (over and above their shares of the settlement as enhanced by their successful objection), that was a matter for the court to determine. *Id.*

The same is true here. Even though Mr. Lauriello's lawyers were not appointed class counsel, and Mr. Lauriello was not appointed to be a class representative, the court's award of attorneys' fees to the Hare Wynn and North Firms was intended to compensate them for the value of their work conferred on the class as a whole, not for their work on behalf of Mr. Lauriello. It is for this reason — and this reason alone — that lawyers who are not class counsel are permitted to take a portion of a class fee that reduces recovery to the class in the first place. *See In re "Angent Orange" Product Liability Litigation.*, 818 F. 2d 216, 222 (2d Cir. 1987) ("The underlying rationale for the [equitable fund] doctrine is the belief that an attorney who creates a fund *for the benefit of a class* should receive reasonable compensation from the fund for his efforts.") (emphasis added). If moneys that would otherwise have gone to the class were going to be used to compensate Mr. Lauriello to "make him whole," that was a matter for the court to determine, just as it was in the case at issue in the Texas Ethics Opinion.

The attorneys from the Hare Wynn Firm and North Firm concede that they did not disclose their payment to John Lauriello to Judge Wynn. (Tr. 661, 801; *see also* Def. Pre-Hearing Mem. 49-50) By not disclosing their arrangement with Mr. Lauriello to the Court, the Hare Wynn Firm and North Firm took approximately $76,000, a portion of which had come directly from the settlement class, and diverted it to an individual class member. The proper ethical route would have been to apply for an incentive award on behalf of Mr. Lauriello, as Mr. Cauley did for his client. (FPFF ¶¶ 302-05) Because that was never done here, the Hare Wynn and North Firms violated Rule 5.4(a). The rigorous analysis standard requires this Court to consider that ethical lapse.

(b) Failure To Disclose the Payment to Mr. Lauriello, Both in 1999 and in 2003/2004, Creates a "Material Limitation" in an Action Alleging That a Court Was Deceived

The failure to disclose the payment to Mr. Lauriello to the Court in 1999 was not an isolated event. From 2003 to 2007 this litigation was maintained on behalf of Mr. Lauriello and only Mr. Lauriello, an individual whom proposed class counsel knew had no damages (because they had made him whole). The Complaint not only did not disclose the payment but, in fact, affirmatively alleged both that Mr. Lauriello *had* been damaged and that his damages were typical of those of the putative class. (Ex. 24 ¶¶ 20, 52 in PX 43; Tr. 657-60) In 2003, immediately upon the filing of the *McArthur* litigation, counsel for Mr. Lauriello moved to abate the action to protect Mr. Lauriello's first-filed position. They did so *without* disclosing that the putative first-filed position was based on — and only on — the claims of a plaintiff who had not been damaged. (Tr. 663-64)

When questioned about this at the Hearing, Mr. Haley asserted that his payments to Mr. Lauriello somehow were subject to the "collateral source" rule and that Mr. Lauriello was therefore still legally damaged. (Tr. 659-60, 679) But the collateral source rule did not and does not apply, since the fees from which Mr. Lauriello was made whole were paid ***by the alleged wrongdoer*** — *i.e.*, MedPartners (through its insurer) — and it is settled that the collateral source rule does *not* apply to payments derived from the wrongdoer. *See Long* v. *Kansas City, M. & B.R.R.*, 54 So. 62, 64 (Ala. 1910) (if plaintiff "recover[s] *of the wrongdoer* the full value of the . . . damages," collateral source rule does not apply) (emphasis added); *Marsh* v. *Green*, 782 So. 2d

223, 230 (Ala. 2000) (collateral source must be "*wholly independent of* . . . the wrongdoer" for rule to apply) (emphasis added, internal quotation marks omitted); *Five U's, Inc.* v. *Burger King Corp.*, 962 P.2d 1218, 1220-21 (Mont. 1998) (source not wholly independent where payments made by co-tortfeasor's insurer); *Douglas* v. *Adams Trucking Co.*, 46 S.W.3d 512, 517 (Ark. 2001) (source not wholly independent where payments made by defendant's insurer); *Mount* v. *Sea Pines Co., Inc.*, 523 S.E.2d 464, 464 (S.C. Ct. App. 1999) (same). For present purposes, however, it matters more that this payment was never disclosed either to Judge Vowell or this Court until it came out in discovery concerning adequacy. In a case that centers (in Plaintiffs' view) around duties of disclosure to a court, this kind of baggage on the part of the Plaintiffs' lawyers creates exactly the kind of "material limitation" on their ability to litigate the case that Rule 1.7 is concerned with preventing.

4. The Fee Sharing Agreement with Milberg Weiss, As Implemented Here, Violated Rule 1.5(e)

The Hare Wynn and North Firms also violated Rule 1.5(e) in the underlying securities case because they accepted a fee in connection with two matters — *Padilla* and *Blankenship* — for which they did no work and without the awareness or consent of the clients involved. Such a fee is, on its face, unreasonable and in violation of Rule 1.5(e).

(a) The Hare Wynn and North Firms Should Not Have Accepted a Fee Award from the *Blankenship* or *Padilla* Actions

As Dean Randall acknowledged (Tr. 431-32), any division of attorneys' fees must comply ***both*** with one of the three branches of Rule 1.5(e)(1) ***and*** with each of Rule 1.5(e)(2), (3), and (4). Rule 1.5(e) provides:

> A division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:
>
> (1) Either

(a) the division is in proportion to the services performed by each lawyer, or

(b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or

(c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;

(2) The client is advised of and does not object to the participation of all the lawyers involved;

(3) The client is advised that a division of fee will occur; and

(4) The total fee is not clearly excessive.

The Hearing evidence confirms that Rule 1.5(e) was violated:

- Both Mr. Haley and Mr. Francis admitted that a substantial portion of their Firms' attorneys' fees came from *Blankenship* yet agreed that the Hare Wynn Firm had not done any work at all on *Blankenship*. (Tr. 651, 759-96) Accordingly, Rule 1.5(e)(1)(a) has not been satisfied.
- Both Mr. Haley and Dean Randall agreed that no written fee agreement exists between the Hare Wynn Firm and the *Blankenship* plaintiffs. (Tr. 433, 652) And Plaintiffs did not provide their ethics expert with any evidence of a written agreement between the Hare Wynn and North Firms and the *Blankenship* and *Padilla* clients.
- The Hare Wynn Firm did not know that the *Blankenship* plaintiffs existed or that Milberg Weiss was involved in *Padilla* before their dispute with Milberg Weiss over attorneys' fees arose in July of 1999. (Tr. 651-52) This would have rendered it impossible for them to advise those plaintiffs of their involvement in those actions, or that they were participating in a fee division in those actions, as was required by Rules 1.5(e)(2) and 1.5(e)(3).
- Neither the Hare Wynn Firm nor the North Firm referred *Blankenship* to Milberg Weiss. (Tr. 653, 796) This renders Rule 1.5(e)(1)(c) inapplicable to the Joint Prosecution Agreement.

This evidence makes it clear that the Hare Wynn Firm and North Firm accepted fees from *Blankenship* and *Padilla* in violation of Rule 1.5(e). Neither firm performed any work on either case. Neither firm referred either case to Milberg Weiss. There is no evidence of any client consent whatsoever. And the fee was not in proportion to the services performed.

(b) The Joint Prosecution Agreement Is Not a Referral Agreement

Plaintiffs' suggestion that the attorneys' fees the Hare Wynn Firm and North Firm received in connection with the 1998 MedPartners Securities Litigation (including *Padilla* and *Blankenship*) constituted an appropriate referral fee (Tr. 156) simply cannot be squared with the language of the Joint Prosecution Agreement.[20] On its face, the Joint Prosecution Agreement is not a referral agreement. (FPFF ¶¶ 37-38) Rather, as the name suggests, it provides for the cases to be "jointly supervise[d] and manage[d]" by the Hare Wynn Firm, the North Firm, and Milberg Weiss. (FPFF ¶ 38) Messrs. Haley and Francis both admitted that they had no idea that *Blankenship* or *Padilla* had been filed by Milberg Weiss until July of 1999. (Tr. 651-52, 701-02, 771-72; FPFF ¶¶ 280-82) They cannot have referred actions they did not know existed. Finally, *Padilla* was filed by Milberg Weiss *before* they even met with the Hare Wynn and North Firms (FPFF ¶¶ 34, 37; Tr. 701), and thus could not have referred by those firms to Milberg Weiss.

Even if the Court were somehow to consider the Joint Prosecution Agreement to have been a referral agreement, however, fee splitting with Milberg Weiss would still violate Rule 1.5(e)(2)-(4), because:

- neither the *Blankenship* nor *Padilla* plaintiffs were advised of or consented to the Hare Wynn Firm or North Firm's participation in their case, as required by Rule 1.5(e)(2) (FPFF ¶¶ 63-64, 283-87);
- none of the clients in the *Blankenship* and *Padilla* matters was advised that the fee split was going to occur between the Hare Wynn Firm, the North Firm, and Milberg Weiss, as required by Rule 1.5(e)(3) (FPFF ¶¶ 278, 283-87, 290-291, 293-94); and
- a fee for over $1 million in connection with cases that a firm did not refer, did no work on, and was even unaware of, is excessive on its face under Rule 1.5(e)(4) (Defs. Pre-Hearing Br. 51-53, 54-56; FPFF ¶ 277).[21]

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[20] As Messrs. Haley and Francis both conceded, there was no such referral in either the *Blankenship* or *Padilla* matter. (Tr. 653, 796)

[21] Any claims that the Hare Wynn Firm or North Firm did anything to benefit the underlying class, much less actually litigate any portion of the 1998 MedPartners Securities Litigation, cannot be substantiated in the case at bar, due to those Firms' failure to provide hours information or other-

Footnote continued on next page.

Plaintiffs' suggestions at the Hearing (Tr. 840-43, 845-46) that the Contingent Fee Agreement entered into between Milberg Weiss and the *Blankenship* plaintiffs somehow served to provide the necessary consent required from the client under Rule 1.5(e) are incorrect. Under Rule 1.5(e)(2), the *identity* of "all lawyers involved" should be disclosed to the client. *See Kosinski* v. *Mason*, 2001 WL 1511543, *2 n.2 (Ct. App. Mich. Nov. 27, 2001) (under disclosure provision identical to Rule 1.5(e)(2), "the client must be advised of the *identity* of the lawyers who will divide the fee") (emphasis added, citation and internal quotation marks omitted); Pennsylvania Eth. Opinion 96-176 (1996), 1997 WL 189081 (under provision identical to Alabama Rule 1.5(e)(2), "the disclosure requirement is satisfied so long as the client is advised *of the identity of the attorneys' law firms participating in the gross fee that is paid*") (emphasis added). The comment to Rule 1.5 is instructive here, as it notes only one piece of information about a fee-sharing arrangement that can be withheld from the client (until requested by the client): the share of the fee that each lawyer is to receive. *See* ALA. R. PROF. CONDUCT 1.5(e) cmt. Thus, by failing to affirmatively advise the *Blankenship* clients that they would be receiving a fee in their case, the Hare Wynn and North Firms violated Rule 1.5(e).

Plaintiffs are also incorrect in arguing (Tr. 355-56) that Milberg Weiss alone had the obligation to advise the *Blankenship* plaintiffs of its Joint Prosecution Agreement and subsequent fee division with the Hare Wynn Firm and North Firm. Both the Hare Wynn Firm and North Firm affirmatively accepted an attorneys' fee award in the *Blankenship* matter, even though they performed no work at all on the matter. Once they agreed to share in that fee, each firm had an ethical obligation to the *Blankenship* plaintiffs. *See Kosinski*, 2011 WL 1511543 at *2 n.2 ("Both the referring lawyer and the receiving lawyer are responsible to see that the client is

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wise quantify their involvement to the Court in the 1998 MedPartners Securities Litigation. (FPFF ¶¶ 222-27) properly advised and does not object to the participation of the lawyers."); *Saggese* v. *Kelley*, 837 N.E.2d 699, 706 (Mass. 2005) (addressing version of Rule 1.5(e) substantially similar to Alabama's: "Although the primary responsibility for compliance will fall on referring lawyers, lawyers to whom referrals are made . . . should confirm, before undertaking such representations, that there has been compliance with rule 1.5(e)."). The Hare Wynn and North Firms did not fulfill that obligation but, instead, accepted their fee awards without ever even attempting to contact the *Blankenship* plaintiffs, in violation of both Rule 1.5(e)(2) and Rule 1.5(e)(3).

In addition, neither the Hare Wynn Firm nor the North Firm is a signatory to the *Blankenship* agreement. (PX 57; Tr. 891-92) In fact, the evidence suggests that the *Blankenship* and *Padilla* plaintiffs had no idea that either the Hare Wynn Firm or North Firm even existed. (FPFF ¶¶ 122, 280, 282, 286-87) While the *Blankenship* Contingent Fee Agreement may have satisfied Rule 1.5(e)(1)(c) as between Alan Gassman and Milberg Weiss — the referring lawyer and receiving lawyer in *Blankenship*, respectively — it did not satisfy any of the Rule 1.5(e)(1) requirements in connection with the Hare Wynn and North Firms, which were neither referring attorneys in *Blankenship* nor signatories to the Contingent Fee Agreement.

(c) The Hare Wynn Firm and North Firm Did Not Disclose Hours Information Required by Judge Wynn

Despite an Order from the Court and two requests from their co-counsel for information (to be submitted to the Court) regarding the hours they spent working on the 1998 MedPartners Securities Litigation, the Hare Wynn Firm and the North Firm did not provide any information regarding the number of hours they actually spent working on the underlying cases to Judge Wynn. (FPFF ¶¶ 54-56, 223-27, 236-59) Especially in a case that involves allegations that the Defendants failed to disclose information required by Judge Wynn's May 10 Order, it matters that the Hare Wynn and North Firms did not submit hours information required by the very same order. While Plaintiffs argue (Tr. 689, 810) that Putative Class Counsel were not recipients of the Court's May 10, 1999 Order requesting "detailed affidavits . . . of descriptions as to the case preparation, discovery and issues resolved, in addition to meaningful compensable time spent by attorneys and paralegals involved herein on the above descriptions of work performed," their co-counsel, attorneys Keith Park and Steve Schulman from Milberg Weiss, were on the service list. (FPFF ¶ 221.1; Ex. 107; Tr. 810-11) And Milberg Weiss sent not one but *two* requests to *all* plaintiffs' counsel — including the Hare Wynn Firm and the North Firm — for affidavits "for award of attorneys' fees and reimbursement of expenses" in connection with the 1998 MedPartners Securities Litigation (Exs. 1029, 1030; FPFF ¶ 223), which the Hare Wynn Firm and the North Firm effectively ignored by concluding that all it required of them was to document less than $8,000 in expenses allegedly incurred by the North Firm.[22]

In their opening statement at the Hearing, Plaintiffs attempted to downplay their failure to provide Judge Wynn with the required information by arguing that, in the underlying action, the total fee was approved and "no one objected or appealed." (Tr. 153) But how could anyone have objected to the Hare Wynn and North Firms' receipt of a fee if none of their fee information was before the Court? Their failure to disclose this pertinent information to the Court, which was charged with assessing the fairness of attorneys' fees and awarding such fees in connection the 1998 MedPartners Securities Litigation, is reason enough to deem the Hare Wynn Firm and North Firm inadequate here. *In re Agent Orange*, 818 F.2d at 226:

> [C]ounsel must inform the court of the existence of a fee sharing agreement at the time it is formulated. This holding may well diminish many of the dangers posed

22 Testimony at the Hearing suggests that the list of expenses provided by the North Firm for submission to Judge Wynn may itself have been misleading. In what (it will be fair for Defendants to argue at trial) may well have been an attempt to conceal from Judge Wynn the Hare Wynn Firm's involvement in the case, the North Firm apparently listed expenses for the Hare Wynn Firm in Mr. North's Declaration, even though the declaration indicated that the expenses were incurred solely by the North Firm. (Ex. 33; Tr. 682-88) Of course, once the Hare Wynn and North Firms' fee was threatened, they quickly informed Judge Wynn of the Hare Wynn Firm's involvement.

> to the rights of the class. Only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising, either by disapproving improper agreements or by reshaping them with the assistance of counsel.

5. The Actions of the Hare Wynn Firm and North Firm in the Underlying Cases Prevent a Finding of Adequacy Here

Plaintiffs argued at the Hearing, as they did in their pre-hearing brief, that, even if Putative Class Counsel did fail to meet their fiduciary duties and breach multiple ethical rules during their involvement in the 1998 MedPartners Securities Litigations, the Court should still find them adequate to represent the putative class here, because those violations were "isolated" and occurred years ago. (Pl. Pre-Hearing Br. 141-43; Tr. 167 (arguing that, even if "maybe there was a violation back then . . . [t]he question is, are we qualified and adequate counsel to represent the class here in 2012")) As we pointed out in our Pre-Hearing Memorandum (at 56-59), however, none of the cases cited by Plaintiffs in support of this proposition involve alleged misconduct that is at issue in the litigation at hand. That, of course, is what we are dealing with here. While it is true that Putative Class Counsel's conduct occurred almost fifteen years ago, this litigation is *entirely about* the events surrounding that very conduct. Moreover, the conduct in question in here is far from an "isolated" violation, but rather demonstrates a pattern of conduct involving the interests of the very class members that Putative Class Counsel now seek to represent. As such, it necessitates a finding of inadequacy in this case.

B. The Hare Wynn Firm and Somerville Cannot Adequately Represent the Putative Class Because of Their Prior Representation of MedPartners' Former General Counsel

Our Pre-Hearing Memorandum (at 59-65) described the conflict of interest of the Hare Wynn and Somerville Firms given their prior and extensive representation of J. Brooke Johnston, MedPartners' former General Counsel, in an employment-related dispute involving MedPartners and Mr. Johnston (the "Johnston Litigation"). Mr. Johnston:

- was the lead in-house lawyer at MedPartners responsible for the Company's legal department (Johnston 34);
- oversaw the completion of all transactions involving MedPartners, including the issuance of any public filings or press releases related to those transactions (*id.* at 34-35);
- supervised all of MedPartners' public filings from May 1, 1996 through at least March of 1998 (*id.* at 24, 43-46);
- was General Counsel when the initial lawsuits comprising the 1998 MedPartners Securities Litigation were filed (*id.* at 128-29);
- prepared and made a presentation to the MedPartners Board on the claims made in those cases (*id.* at 137);
- participated in the Company's selection of defense counsel for those cases (*id.* at 129-30); and
- attended at least one meeting involving defense counsel and the Company's insurer to discuss the strategy for defending against the claims asserted in the 1998 MedPartners Securities Litigation (Newman 230-31).

The deposition testimony also revealed that the Hare Wynn and Somerville Firms represented Mr. Johnston in defending claims regarding all of Mr. Johnston's activities associated with MedPartners, including claims regarding Mr. Johnston's involvement in many of the very same facts and circumstances that formed the basis for the alleged claims asserted against the Company in the 1998 MedPartners Securities Litigation. (*Id.* at 144-45) The Hare Wynn and Somerville Firms vigorously defended Mr. Johnston against those allegations — contending that Mr. Johnston's work as General Counsel did not involve any breach of fiduciary duty to MedPartners or its shareholders, and contending that Mr. Johnston did not commit any fraud in connection with the transactions, public filings, and press releases MedPartners issued from May 1, 1996 through at least March of 1998. Not surprisingly given this defense and the significance of the claims asserted in the Johnston Litigation, Mr. Johnston shared with his lawyers, including Mr. Haley, Judge Cook, and Mr. Somerville, all information that could have been relevant to those claims, without "concern . . . that [Mr. Johnston] might be breaching a fiduciary duty or attorney-client privilege owed to MedPartners." (Johnston 192)

In pursuing the claims asserted on behalf of the class in this case, Putative Class Counsel cannot use this and any other information they may have regarding MedPartners. Rule 1.9(b) prohibits the Hare Wynn and Somerville Firms from now using against MedPartners the confidential information of MedPartners that these Firms obtained during their representation of Mr. Johnston. (*See* Morgan Report ¶ 7; Morgan 164-65, 174-75) As Professor Morgan set forth in his Report:

> [I]t would be professionally improper for the Hare firm and Somerville to act as class counsel in this matter because each had represented MedPartners' former General Counsel, J. Brooke Johnston, Jr., when he was accused by MedPartners of misconduct in connection with matters at issue in the 1999 class action. (Morgan Report ¶ 7)

The Hearing confirmed the testimony previously adduced regarding this disqualifying conflict. Messrs. Cook, Haley, and Somerville confirmed their representation of Mr. Johnston in the prior litigation. (Tr. 474-75, 667, 964-65) Messrs. Cook, Haley, and Somerville also confirmed the scope of the allegations at issue in Mr. Johnston's case. That case put at issue, as Mr. Somerville expressly agreed, "everything he'd [Mr. Johnston] done while he was general counsel at the company and everything he'd done on behalf of the company before becoming general counsel." (Tr. 999; *see also* 476, 668) Thus, the Hearing confirmed that the Johnston Litigation included allegations regarding Mr. Johnston's activity in many of the very same transactions and events that formed the basis for the claims asserted in the 1998 MedPartners Securities Litigation. (Tr. 668-69, 671; *see also* 476 (Justice Cook agreeing that the "claims that MedPartners made against Mr. Johnston arose out of claimed malfeasance that gave rise to the underlying 1998 MedPartners security litigation")); 999-1003) Finally, Messrs. Cook, Haley, and Somerville agreed that Mr. Johnston shared with all of them all of the information necessary to defend against the allegations at issue in Mr. Johnston's case. (Tr. 554-56, 672-73, 676, 1006)

Based on these acknowledged facts, Professor Morgan, who also testified at the Hearing, confirmed that the Hare Wynn and Somerville Firms have "a former client conflict that is violative of Rule 1.9(b)." (Tr. 874) That rule "prohibits the disclosure of confidential information of a former client . . . in a later matter," precisely as Plaintiffs' counsel intends to do here. (*Id.*) Professor Morgan described his opinion in greater detail:

> What I'm saying in this case is when you represent a lawyer who has confidentiality obligations to his client MedPartners, you take that client Mr. Johnston, as you find him with his obligations. And you are required to protect that confidential information, except to the extent it's waived, which is the second aspect in all this." (Tr. 876-77)[23]

In defending Mr. Johnston, the Hare Wynn and Somerville Firms collected and were provided with confidential information, information that they are professionally obligated to maintain in confidence, regarding certain of the very same claims that they now seek to assert on behalf of the proposed class. As Justice Cook conceded at the Hearing, the Hare Wynn Firm alone has 50-100 boxes of materials related to their representation of Mr. Johnston, and it would be difficult for the involved lawyers to go back through those boxes to try to discern where specific information came from. (Tr. 562)

That inability to go back and discern where and how one ascertained such information is among the reasons that the law presumes that confidential information provided in circumstances such as these remains confidential without a showing of specific waiver. As Professor Morgan explained:

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23 Dean Randall readily agreed with this basic proposition, when considered in the context of a hypothetical lawyer representing a doctor:

> Q Let me ask you a hypothetical now. Assume that I represent a doctor and that doctor properly shares with me, as his lawyer, some medical records containing confidential information about some of his patients. It was appropriate for him to share it with his lawyer. Can I, as a lawyer, take the information I learned from one of those medical records and then sue that patient on behalf of another client based on the confidential information I received from that doctor client?
>
> A I think this was a question you asked Mr. Somerville in his deposition. Again, we're going by your hypothetical. The answer to that would be no. (Tr. 441-42)

> And the problem in all of these cases is that you can't expect the party whose confidential information is at stake to come in and say, the following six things are confidential against the world and I'm going to disclose them here to explain to you that there's confidential information. If you did that, the party would be waiving their confidentiality by the very act of trying to protect it. So what the rules do is presume that the information that's disclosed is not waived, unless you've got some affirmative evidence that information that's now being used was, in fact, waived as was asserted or has become generally known, as that term is used in Rule 1.9(b). (Tr. 879-80)

In short, the obligations that the Hare Wynn lawyers and Mr. Somerville have to maintain the confidentiality of information they received from Mr. Johnston limits their ability to pursue these claims on behalf of the class, rendering them inadequate counsel in this case. (*See* Morgan Report ¶ 7; Morgan 153-55)

Plaintiffs' counsel raised numerous arguments at the Hearing to try to get around the duties and obligations imposed on them by the Alabama Rules of Professional Conduct. One of those arguments was that the Hare Wynn Firm and Mr. Somerville had never represented MedPartners. Plaintiffs' counsel and Dean Randall claimed that the Hare Wynn and Somerville Firms are not burdened by a conflict of interest associated with the Johnston Litigation because in both this case and in the Johnston Litigation, Plaintiffs' counsel was adverse to MedPartners. (Tr. 157, 378) This argument misconstrues the nature of the obligations Plaintiffs' counsel undertook when representing Mr. Johnston. Professor Morgan described these lawyers' obligations during the Hearing:

> The basic principle is that when a lawyer represents a client who has confidentiality obligations to somebody else, and the lawyer gets information from the client with respect to that other person, the information that the lawyer has obtained about that other person is information that is included within the category of confidential information protected by Rule 1.9(b). The example that has already come up here and that Dean Randall correctly agreed with was the example of the lawyer representing a doctor who has turned over medical records that the doctor is ordinarily required to keep confidential, but is entitled to turn it over to the lawyer for purposes of defending himself in some kind of a proceeding. The lawyer is thereafter barred from using that information about those patients against the patients in some other setting. There are other cases as well. Another one that's common is the joint defense agreement where you don't represent the other parties to the joint defense agreement, the lawyer doesn't, but the lawyer learns information about those other parties in the course of the discussions during the joint

> defense agreement. The cases are really consistent that the lawyer is thereafter barred from filing a lawsuit that's substantially related against one of those co-defendants, just as he would be if those other defendants had been his own client. That's the principle we're working with here. (Tr. 875-76)

The fact that the Hare Wynn and Somerville Firms were always adverse to MedPartners is simply beside the point, as Professor Morgan explained in depth. Even Plaintiffs' expert agrees that Mr. Johnston, given his continuing duties of confidentiality to MedPartners, could not pursue this case against MedPartners. (Tr. 442) If Mr. Johnston's duties prohibit him from pursuing this case, his lawyers, who have assumed those duties in undertaking to represent Mr. Johnston, are prohibited from pursuing this case in precisely the same way.

During the Hearing, in an attempt to avoid the impact of this conflict, Plaintiffs' counsel repeatedly argued that MedPartners had waived all confidentiality and privilege that could have applied to any information of Mr. Johnston's regarding MedPartners. Dean Randall, who testified on Plaintiffs' behalf, went so far as to claim that "for the life of me, I cannot imagine any information that was not aired fully in open court in several litigations and even arbitration that hasn't been part of the public discourse." (Tr. 378) But Dean Randall had not seen any of the pleadings, discovery, or depositions in any of the cases that Plaintiffs now claim to have fully aired the confidential information Mr. Johnston obtained during his long-term representation of MedPartners. (Tr. 439-41) No lawyer involved in any of these other cases was able to confirm, with any degree of specificity, Dean Randall's sweeping conclusion in this regard.

The other cases involving MedPartners that Plaintiffs' counsel and Dean Randall claimed to have waived confidentiality consisted of (1) a confidential arbitration proceeding; (2) two separate employment-related matters involving former MedPartners employees; and (3) the Johnston Litigation itself. (Tr. 439-41, 474-79, 489-96) In connection with these matters, MedPartners did not intentionally waive any confidentiality associated with all information provided to Mr. Johnston. The arbitration proceeding was confidential and involved a dispute between parties that at all times had aligned interests as it relates to MedPartners' confidentiality concerning the facts and circumstances of the 1998 MedPartners Securities Litigation. (Tr. 299-301) The employment-related matters involving other former MedPartners' employees, on the other hand, did not involve Mr. Johnston, or any former lawyer at MedPartners, and, thus, could not have revealed the full extent of confidential information Mr. Johnston collected from MedPartners. And in the Johnston Litigation, MedPartners was disclosing information to its former lawyer, who was bound by duties of confidentiality not to disclose the very information that Plaintiffs' counsel now contends was fully revealed to the world. Professor Morgan explained that a disclosure of confidential information in this context — a dispute between a client and its lawyer — does not somehow broadly waive a client's confidentiality for purposes of different proceedings: "[T]he reason we have a rule like 1.6(b)(2), the reason you allow it [confidential information] to be disclosed to the lawyer is that the lawyer takes it subject to an obligation not to disclose it further. You know it's safe to disclose it to the lawyer, because the lawyer takes it with a fiduciary obligation to, in this case, MedPartners." (Tr. 878-79) These other cases simply did not effect a broad or blanket waiver of confidentiality as Plaintiffs claim.

Finally, during the Hearing, the Hare Wynn and Somerville Firms attempted to get around their conflict of interest by claiming that they could not recall any confidential or privileged information of MedPartners that Mr. Johnston shared with them. (Tr. 673-74, 1005-06) This contention is belied by the facts as developed in this case. First, Mr. Johnston testified completely contradictory to this new-found contention.

> Q Is there anything that you declined, is there any information that you declined to provide to the lawyers because of a concern on your part that you might be breaching a fiduciary duty or attorney-client privilege owed to MedPartners?
>
> . . .
>
> A No. I was given to understand and I still understand that whatever I needed to tell them in order to defend myself against allegations as broad as those brought by MedPartners, were things

> I could tell my counsel about. (Johnston 192; *see also id.* at 149)

At least during his deposition, Mr. Haley agreed with Mr. Johnston on this point:

> Q And he also testified that he had been advised that it was permissible for him to disclose what would otherwise be confidential or privileged MedPartners' information in the defense of the claims that had been asserted against him. Do you recall that testimony in substance?
>
> A Yes.
>
> Q And did your firm give him that advice?
>
> A Yes.
>
> Q Okay.
>
> A He had the absolute right to disclose it to his attorneys.
>
> Q And I'm not asking you right now what he said, but is it your impression that he, in fact, did share with you whatever information was necessary to defend the claims that had been asserted against him even if it might otherwise have been privileged or confidential?
>
> A That's correct. (Haley 145-46)

Thus, the question here is not really whether Mr. Johnston disclosed privileged and confidential information to the Hare Wynn and Somerville Firms; it is really only a question of how much of what he disclosed remains confidential. Caremark's inability to ascertain precisely what was disclosed is compounded by the fact that Plaintiffs' counsel in this case have claimed that any information they received from Mr. Johnston regarding MedPartners is privileged between Mr. Johnston and the Hare Wynn and Somerville Firms. (Johnston 148) Plaintiffs' counsel's position vividly demonstrates the fundamental unfairness at work here because they have asserted the attorney-client privilege to effectively block Caremark's attempt to find out what privileged and confidential information its former General Counsel shared with the lawyers now suing the Company. And Dean Randall was only speculating and guessing about whether any of the shared information remains confidential because he admitted that he did not know what Mr. Johnston shared with the Hare Wynn and Somerville Firms, nor does he know what was subsequently disclosed because he has not read the pleadings or testimony of the subsequent proceedsings. (Tr. 459-463)

The bottom line is that MedPartners has not voluntarily agreed to a blanket waiver of all confidentiality associated with information provided to Mr. Johnston. As noted, both Professor Morgan and Dean Randall agreed that Mr. Johnston could not pursue these claims against MedPartners. That is so because of the confidential and privileged information Mr. Johnston received from MedPartners regarding the matters at issue in this case. If Mr. Johnston cannot pursue these claims, his lawyers, who stand in Mr. Johnston's shoes with respect to this confidential and privileged information, similarly cannot maintain these claims.

In the end, even if some of the information that the Hare Wynn and Somerville Firms learned from Mr. Johnston has been publicly disclosed such that it is no longer confidential, that does not cure the adequacy problem associated with this conflict of interest. Were Plaintiffs' counsel appointed to represent the proposed class in this case, the Court would have to make a finding regarding whether Plaintiffs' counsel, consistent with their obligations under Rule 1.9, could use virtually any information that Plaintiffs' counsel intended to present in this case. (*See* Morgan Report ¶ 7(d); Morgan 181-82) The Court would have to investigate whether Plaintiffs' counsel received that information from Mr. Johnston; whether the information had been disclosed in some other proceeding; and whether that disclosure was sufficient to make the information generally known to the public. That would necessarily entail reviewing thousands of pages of deposition, arbitration, and trial transcripts to determine exactly what information has and has not been waived. This could easily lead to a series of mini-trials over confidentiality, and there simply is no reason to hinder the progression of this case so severely. This potential distraction alone renders Plaintiffs' counsel inadequate to represent the proposed class here.

C. Putative Class Counsel Are Not Adequate Because of Their Conduct During the Current Action

Putative Class Counsel's conduct during the current litigation also calls their adequacy into question in two distinct ways. First, they have simultaneously represented John Lauriello both as a plaintiff and as a defendant in this action, thus actively seeking to limit the recovery of the very putative class that they now seek to represent. Second, they entered into a Lead Counsel Agreement with Intervenors' counsel that provided Intervenors' counsel with their consent to his receiving up to a certain percentage of the legal fees in this case in exchange for his agreeing to drop his objections to their adequacy as class counsel. Each of these separately necessitates a finding that Putative Class Counsel are inadequate to represent the putative class here.

1. Putative Class Counsel's Appearance for Lauriello as a Defendant Violated Rule 1.7(a)

Putative Class Counsel's violation of Alabama Rule of Professional Conduct 1.7(a) is stark and simple. The rule bars a lawyer from representing a client "if the representation of that client will be directly adverse to another client," and the comment to the rule makes clear that it "prohibits representation of opposing parties in litigation." ALA. R. PROF. CONDUCT 1.7(a); ALA R. PROF. CONDUCT 1.7 cmt. On March 19, 2007, the McArthur Intervenors named John Lauriello as a defendant in their Class Action Complaint in Intervention, asserting that he breached his duties to the class in the underlying 1998 MedPartners Securities Litigation settlement. (FPFF ¶¶ 16-17) From that date until March 23, 2009, when the Intervenors voluntarily dismissed their claims against Lauriello (FPFF ¶ 31), Putative Class Counsel represented him as a defendant in this case while at the same time representing Plaintiffs and seeking to represent the putative class. (FPFF ¶¶ 17.1-17.2; Tr. 828) There is no way to simply overlook this clear breach of Rule 1.7(a).

In zealously representing Mr. Lauriello as a defendant, Putative Class Counsel have actively worked to limit the recovery of the very putative class that they now seek to represent. To that end, Putative Class Counsel filed and argued a motion to dismiss Mr. Lauriello as a defendant (FPFF ¶¶ 18-19), seeking a result — the foreclosing of a source of potential recovery — directly adverse to the interest of the putative class.

At the Hearing, in an attempt to avoid the dictates of Rule 1.7(a), Plaintiffs' counsel suggested that their motion to dismiss was based purely on technical and procedural grounds. (Tr. 830) As shown in the Hearing (Tr. 976), that is just not so. In reality, Putative Class Counsel mounted a full-throated, merits-based argument to dismiss Mr. Lauriello in their brief and at oral argument. (*See* Motion to Dismiss John Lauriello as a Defendant in Intervention ¶ 5 ("John Lauriello owed no legal duties to the McArthur Intervenors, and, therefore, did not and could not have breached any fiduciary duty to the McArthur Intervenors or the Class."); Ex. 1024 at 28 (Stipulation of Settlement "[did] not create a duty by John Lauriello"); *id.* at 13 ("there's no legal duty"); *id.* at 29 ("there was no duty")) Indeed, they argued that, even if Lauriello *knew* of the alleged fraud, the class would have no claim against him, stating: "[F]or the purposes of this motion, assume Lauriello knew something. There was no duty." (Ex. 1024 at 14) In case their repetition of the argument was not sufficient, Putative Class Counsel made clear in court that their merits argument was the "primary point" in their motion to dismiss. (Ex. 1024 at 11)

Putative Class Counsel argue that, somehow, their representation of Mr. Lauriello as a defendant in this case was not adverse to the putative class. (Tr. 832, 833, 847, 974, 977) That argument, too, is a non-starter. The McArthur Intervenors sued John Lauriello on the basis that, as a putative class representative, he owed a duty to the class in the 1998 MedPartners Securities Litigation. (FPFF ¶¶ 14, 17) As a result of his alleged breach of that duty, Intervenors argued, the members of the putative class in the case at bar were entitled to recover from him individually. (Ex. 1024 at 8) In response, Putative Class Counsel argued that Lauriello — and by extension, any of the named plaintiffs who were not ultimately deemed class representatives (*see* Ex. 1024 at 11) — owed no duty to the underlying class, and thus could not possibly owe anything to the putative class here. This argument, if it had succeeded, would have blocked the putative class from any potential recovery not just from Mr. Lauriello, but from an entire category of important actors in the 1998 MedPartners Securities Litigation. Actively seeking to limit the recovery of the putative class can *never* be anything but adverse to the interests of the putative class.

Putative Class Counsel go so far as to claim that their arguments on behalf of Lauriello were *good* for the putative class because the Intervenors were just slowing down the proceedings in this case. "The claims alleged by the McArthur [I]ntervenors . . . were adverse to the class. So we were really trying to further the interests in the class by filing the motion [to dismiss Lauriello]." (Tr. 977) This argument confuses the interests of Putative Class Counsel — who wanted to stop the Intervenors' challenge to their adequacy — and the interests of the putative class. It is also contrary to the Alabama Supreme Court's decision in this case, which concluded that the Intervenors' interests were *protective of*, not adverse to, the interests of the class, holding that "justice may not be attained if intervention is not allowed." *Ex parte Caremark*, 956 So. 2d at 1129. And in explaining the importance of Intervenors' role in this case, the Supreme Court repeatedly emphasized the alleged negligence and inadequacy of John Lauriello in his individual capacity. *See id.* at 1128 (noting Mr. Lauriello's alleged negligence); *id.* at 1129 (noting Mr. Lauriello's alleged conflict of interest with class members). Although the Alabama Supreme Court did not take a position on the merits of the Intervenors' claims against Mr. Lauriello, it is clear that the Court believed that it was in the interests of the putative class to have those claims fully vetted and aired. Putative Class Counsel's zealous efforts to extinguish those potential class claims, at least in part to preserve their own position in the case, cannot possibly be seen as furthering the putative class' interests.[24]

2. Putative Class Counsel Violated Their Duty to the Putative Class by Entering into the Lead Counsel Agreement with Counsel for the Intervenors

As explained in detail in Defendant's Pre-Hearing Memorandum (Part IV.C.2), under the Lead Counsel Agreement, Intervenors agreed, among other things, to consent to Putative Class Counsel's adequacy (and, it was understood, to dismiss, with prejudice, all claims against Mr. Lauriello) in return for Putative Class Counsel's promise not to object to Mr. Vines's petition for up to 7.5% of any attorneys' fees. (FPFF ¶¶ 29-30) Putative Class Counsel would take the lead in this case, with Mr. Vines's role being merely to "assist and advise in the prosecution of class claims." (FPFF ¶ 28; Ex. 21 ¶ 3) The agreement was reached on February 25, 2009, less than one month after each side argued motions to disqualify the other in this court. (FPFF ¶ 27) Those motions were also withdrawn pursuant to the agreement. (FPFF ¶ 29)

At the Hearing, Plaintiffs argued that under the Lead Counsel Agreement, Intervenors were "not restricted in any way," and that Intervenors "can still do whatever they want to do in the context of their intervening." (Tr. 160) This is not so. Most importantly, through the Lead Counsel Agreement, Intervenors gave up their right to challenge the adequacy of Putative Class Counsel or to seek to represent the putative class in this case. (FPFF ¶ 29.1; Tr. 665, 824)

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[24] When pressed as to the foundation of his opinion that Putative Class Counsel's simultaneous representation did not run afoul of Rule 1.7, Dean Randall suggested that Mr. Vines's motive in naming Mr. Lauriello as a defendant (Tr. 448), the ultimate merit of Intervenors' claim against Mr. Lauriello (*id.* at 447), or differences in the specific issues litigated on behalf of each client in the same matter (*id.* at 446) each excused Putative Class Counsel's conduct. Tellingly, Dean Randall cited to no case or other authority finding these factors to be relevant in determining whether a violation of Rule 1.7 occurred. None exists. Representing a plaintiff and defendant in the same case is a quintessential violation of Rule 1.7, and Putative Class Counsel have done exactly that. As Professor Morgan testified, this violation is simply "not a controversial point." (Tr. 900-01)

By agreeing in the Lead Counsel Agreement not to challenge the adequacy of Putative Class Counsel, Intervenors' counsel agreed to forgo what he had previously represented to this Court and the Alabama Supreme Court was the sole purpose of the intervention — namely, to participate in discovery concerning the adequacy of representation in order to disqualify Lauriello and his counsel. (*See* Ex. 44 in PX 43 at 6 (arguing that McArthur Intervenors wanted to intervene "only for the purpose of disqualifying Lauriello and his counsel in order that the second-filed *McArthur* case would then control the litigation"); *id.* at 10 (arguing that "Intervenors (and indeed the entire class) [would be] certain to suffer it they [were] prevented from challenging the adequacy of the representation of John Lauriello and his counsel in this action"); McArthur Br. on Appeal at 55 (arguing that "the very purpose for and nature of McArthur's intervention" was to "seek[] participation in discovery concerning the adequacy of representation"); *id.* at 37 ("McArthur specifically seeks intervention in the class action to participate in the discovery concerning the adequacy of representation to protect their interests in the outcome of the litigation.")) The agreement thus limits Intervenors in one of the ways that matters most.

The Lead Counsel Agreement also limits Intervenors' counsel in other significant ways. As Putative Class Counsel conceded at the Hearing, under the agreement, if Mr. Vines wants to pursue any discovery on behalf of the Intervenors, he must first get the approval of Putative Class Counsel. (Tr. 825; Ex. 21 ¶ 8) In other words, before initiating discovery to assess the adequacy of counsel, Mr. Vines was required to ask for permission from the counsel whose adequacy he was assessing. Moreover, under the agreement, if Mr. Vines attempts to file a motion, brief, or other paper in this case, Defendants are not even required to *respond* to it without an express order from the Court. (Ex. 21 ¶ 2(ix)) Far from being "not restricted in any way," Intervenors are severely restricted in significant ways. It is no wonder that Intervenors' counsel has had no significant involvement in this case since the execution of the agreement. (FPFF ¶ 32(a)-(e))

And out of all this, the putative class got nothing. Indeed, in case there was any doubt, Hearing testimony has confirmed that the most concrete loss to the putative class implicit in the Lead Counsel Agreement — the dismissal of all claims against John Lauriello — was secured in exchange for no benefit at all to the class. (Tr. 829-30; FPFF ¶ 31.1) And, for all of the protestations offered at the Hearing about the transparency of the Agreement and its having been filed with the Court, no one denied that the *quid pro quo* involving the dismissal with prejudice of the claims against Mr. Lauriello is conspicuous by its absence from the document.

Intervenors' counsel's radical change in his views on Putative Class Counsel's adequacy since signing the Agreement speaks volumes. Since signing the Lead Counsel Agreement, Intervenors' counsel has adopted arguments in this case that he previously described to this Court as "truly amazing and incredible, flatly outrageous, absurd, incomprehensible, disingenuous, preposterous, wild, unfounded, and utter nonsense." (FPFF ¶ 33.16; Vines 114-15) Among other things:

- ***Before signing the Lead Counsel Agreement***, Intervenors' counsel took the position that Lauriello's counsel had a legal obligation and duty in 1998/1999 to investigate fully and ascertain the extent of available insurance to pay a settlement or judgment in the case, because they either "realized or should have realized that there were serious questions as to whether the settlement represented all the available monies of the defendants and its insurer and whether the settlement was being fraudulently obtained." (FPFF ¶ 33.1; Ex. 44 at 52)
- Intervenors also took the position that Lauriello's counsel had had a duty *after* the settlement in principle was reached in 1998/1999 to seek discovery from Judge Wynn as to the amount of available monies to pay a settlement. Intervenors further argued that if Judge Wynn denied that request, Putative Class Counsel were obligated to seek mandamus and/or object to the settlement. (FPFF ¶ 33.2; Ex. 45 at 13).
    - ***After signing the Lead Counsel Agreement***, however, Intervenors' counsel changed his position entirely, saying that he was simply "wrong" and "mistaken" in taking his earlier position. He now maintains that the Hare Wynn and North firms had no duty at all in the 1998 MedPartners Securities Litigation to investigate the extent of the insurance coverage available to the class, even if they had reason to know that there was more insurance available, "because their case had

been dismissed," and because "they had other people who were class counsel for plaintiffs that had that duty and [were] assigned that responsibility." (FPFF ¶ 33.3; Vines 88-89, 92-93)

- ***Before signing the Lead Counsel Agreement***, Intervenors' counsel argued that Mr. Lauriello had a fiduciary duty, independent of his lawyers, to insist that his lawyers in 1998/1999 undertake adequate discovery and investigation into the amount and extent of the known additional excess insurance coverage purchased by MedPartners. (FPFF ¶ 33.4; Ex. 45 at 17)
    - ***After signing the Lead Counsel Agreement***, however, Intervenors' counsel reversed his position on this issue as well. Intervenors' counsel now says that he was just "wrong about that" and that, in making that argument to this Court he "just misspoke," because Mr. Lauriello "hadn't been appointed class representative" and therefore could not have had any fiduciary duty to the class in the 1998 MedPartners Securities Litigation. (FPFF ¶ 33.5; Vines 144-145) The position now adopted by Intervenors' counsel is, of course, the very position already rejected by this Court (at the urging of Intervenors' counsel) in denying the motion to dismiss Mr. Lauriello in this case.
- ***Before signing the Lead Counsel Agreement***, Intervenors' counsel argued that Messrs. Somerville, Haley, and Cook were put on notice when Mac Crawford was deposed in another case on March 14, 2000 that there had been unlimited liability insurance available in 1998/1999. (FPFF ¶ 33.6; Ex. 44 in PX 43 at 42 ("If by some stretch of the imagination, Lauriello's lawyers remained ignorant of the existence of MedPartners' unlimited liability insurance after Mr. Hardin's deposition, that ignorance was cured when Mac Crawford was deposed on March 14, 2000"); *see also* Vines 99-100)
    - ***After signing the Lead Counsel Agreement***, however, Intervenors' counsel reversed his position on this point too, now arguing that Mr. Crawford's March 14, 2000 testimony does *not* reveal the existence of "unlimited liability insurance" at all and that Intervenors' counsel was "mistaken about that." (FPFF ¶ 33.7; Vines 99-100)
- ***Before signing the Lead Counsel Agreement***, Intervenors' counsel argued that "even a casual reading" of MedPartners' December 17, 1998 press release and April 15, 1999 10-K "pretermits any conclusion other than that there was much more additional excess insurance than the fifteen million dollars that Lauriello and his counsel now belatedly attempt to explain." (FPFF ¶ 33.8; Ex. 45 at 19; Vines 116)
    - ***After signing the Lead Counsel Agreement***, however, Intervenors' counsel now says that he has re-read those documents and interprets them in precisely the manner that he earlier told this Court that they could not be interpreted. (FPFF ¶ 33.9; Vines 116-17, 133-34) In fact, Intervenors' counsel now says that Lauriello's counsel "had no reason…to suspect or believe

> that there was any greater insurance than the sixty-five million." (FPFF ¶ 33.9; Vines 87)

- ***Before signing the Lead Counsel Agreement***, Intervenors' counsel argued that the distinction being made by Lauriello's counsel between knowledge of "excess insurance" and knowledge of "unlimited insurance" was a "bogus issue" that was "nothing more than a smoke screen to conceal the real issue," which, according to Intervenors' counsel was whether Lauriello and his attorneys were placed on notice of facts that required them to "pursue formal discovery and further investigation as to the total amount of additional excess insurance which defendant MedPartners had publicly stated it had purchased to rid it of any further liability with regard to the numerous class action claims." (FPFF ¶ 33.10; Ex. 45 at 18)
  - ***After signing the Lead Counsel Agreement***, however, Intervenors' counsel says that he was "dead wrong" about that too. (FPFF ¶ 33.11; Vines 141)
- ***Before signing the Lead Counsel Agreement***, Intervenors' counsel alleged in his Complaint in Intervention that certain representations made in the Cauley/ Selinger Joint Affidavit about the diligence done by plaintiffs' counsel in connection with the financial ability of MedPartners to pay any settlement or judgment were "false," that plaintiffs' counsel in the underlying case either "knew or should have known they were false" (FPFF ¶ 33.12; Ex. 42 in PX 43 ¶¶ 51, 52), and that, contrary to Messrs. Cauley's and Selinger's representations, "[n]o depositions or other formal discovery (e.g., interrogatories, requests for production, requests for admission) were conducted by any of plaintiffs' class counsel with respect to the true current and prospective financial condition of the defendant and the availability of additional indemnity/insurance coverage." (Ex. 42 ¶ 52)
  - ***After signing the Lead Counsel Agreement***, however, Intervenors' counsel now takes the position that Messrs. Cauley and Selinger *did* investigate how much insurance was available to MedPartners. (FPFF ¶ 33.13; Vines 169-70) The sole basis that Intervenors' counsel provided for this change in position was the very statement in the Cauley and Selinger affidavit that Intervenors' allege was false in their Complaint in Intervention. (FPFF ¶ 33.13; Vines 171-72) That Complaint in Intervention is still the operative pleading for the Intervenors in this case.
- ***Before signing the Lead Counsel Agreement***, Intervenors' counsel argued to this Court in Intervenors' motion to disqualify Lauriello's counsel in this case that Messrs. Somerville and Haley were disqualified from representing the putative class in this case because they received confidential information from J. Brooke Johnston, the former General Counsel of MedPartners, when they represented him against MedPartners in an earlier employment litigation. (FPFF ¶ 33.14; Ex. 45 at 14)
  - ***After the Lead Counsel Agreement was signed***, and even though none of the facts upon which that argument was based have changed to date, Intervenors' counsel now disavows that argument and consents to Messrs. Somerville and Haley act-

> ing as lead counsel in this litigation. (FPFF ¶ 33.15; Vines 249-52)

None of these changes of position taken by Intervenors' counsel was based on any change in the facts at issue in this matter. There was no new evidence uncovered between the time Intervenors' counsel made these arguments to this Court and the time Intervenors' counsel reversed course entirely. (FPFF ¶ 33.17) The history of the Lead Counsel Agreement demonstrates yet again the validity of Professor Morgan's observation that "when the issues of the class's interest in full representation or full development of their best case runs up against the interest of [Putative Class Counsel] in not really getting into those matters in which they were involved . . . the solution to the problem becomes to sacrifice the interest of the class." (Tr. 903)

D. Putative Class Counsel Are Inadequate Because They Will Be Fact Witnesses in the Litigation, a Prohibited Practice Under Rule 3.7

As set forth in our Pre-Hearing Memorandum (at 69-72), Putative Class Counsel further fail the adequacy requirement because they will be necessary fact witnesses in this case, a prohibited practice under Alabama Rule of Professional Conduct 3.7. This became even more evident during the Hearing, during which it also became clear that much of the testimony from Putative Class Counsel will be adverse to the interests of the putative class, creating a "material limitation" conflict as identified in Section II.A, above.

1. Putative Class Counsel Will Be Necessary Witnesses Adverse to the Class

Putative Class Counsel argues that their testimony will not be *necessary*, and that Rule 3.7 is therefore not implicated. (Pl. Pre-Hearing Br. 134-38; Tr. 163-64) But if the Hearing made one thing clear, it is that counsel's testimony in this case will be both necessary, on several points, and adverse to the putative class. Thus:

Putative Class Counsel have a unique perspective on Bill Lerach's evaluation of the settlement. One of Defendants' arguments on the merits will be that the $65 million settlement was fair and reasonable *regardless* of the amount of available insurance. The contemporaneous views of Bill Lerach, who negotiated the settlement for the 1998/1999 class, are plainly relevant on this score, but Mr. Lerach suffered almost total amnesia at his deposition in this action.[25] Of the numerous lawyers and law firms in the 1998 MedPartners Securities Litigation, Messrs. Haley and Francis are of the few that are in a position to testify live to Mr. Lerach's contemporaneous assessments of the settlement. Mr. Lerach told Mr. Haley that the settlement of the 1998 MedPartners Securities Litigation was an "excellent settlement" (FPFF ¶ 145.1; Tr. 615), a statement that was made *without* reference to insurance (FPFF ¶ 145.2; Tr. 615). Indeed, *no* attorney at Milberg Weiss *ever* told Mr. Haley (or Mr. Francis for that matter) in words or substance that the litigation had settled for all the available insurance money, plus some. (FPFF ¶ 145.3; Tr. 614-15) Similarly relevant is Mr. Francis's conclusion from his conversations with Mr. Lerach that Lerach had obtained the full amount of money that the insurance companies were willing to pay to settle the cases at that time (FPFF ¶¶ 178.4-178.5; Tr. 777) — which, of course, is a very different thing from being told that plaintiffs in 1998/1999 got the policy limits and corroborates Defendants' view of the negotiations and settlement.

Putative Class Counsel are key players in Defendants' case on lack of materiality and lack of reliance. Another of Defendants' arguments on the merits will be that plaintiffs' counsel as a group were so focused on the massive attorneys' fees they expected to receive as a result of the proposed settlement — the largest securities settlement in Alabama history at that time — that they simply turned a blind eye to anything that might derail the train heading to payday. The Toll/Squitieri letter and its aftermath, of course, are central to this argument, since the

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25 *E.g.*, Lerach 18, 19-20, 22-23, 31-32, 33, 38-39, 43, 44, 46, 47-48, 49-50, 59, 60-63.

December 1998 press release was waved under the noses of Messrs. Lerach, Cauley, and Selinger, and they not only did nothing about it but paid off Messrs. Toll and Squitieri to make *sure* nothing would come of it. But there is plenty more, and Defendants are entitled to put on their best case. That case includes:

- Mr. Haley's testimony that he was "elated" when he heard about the size of the settlement. (Tr. 597-98)
- Gene Cauley's admission that he (and other counsel) should have investigated the insurance after receiving the Toll/Squitieri letter (Cauley 195), coupled with Mr. Haley's testimony that the letter was sufficient to impel its recipients (if, of course, they actually cared about insurance) to go to AIG and MedPartners and ask the questions Messrs. Toll and Squitieri were asking regarding the exact amount of insurance. (Tr. 626) Mr. Haley was a player in 1998 and 1999, he was relying (to the total exclusion of any due diligence of his own) on Messrs. Lerach, Cauley, and Selinger to be doing their jobs with respect to the settlement, and his views as to what Messrs. Lerach, Cauley, and Selinger *should* have done is something Defendants are entitled to have the jury hear.
- So are Mr. Francis's. Defendants will be entitled to present Mr. Francis's testimony that it was "incumbent to people who had been appointed plaintiffs' counsel" to look at the Company's public filings and press releases in investigating the fairness of the settlement (Tr. 754) and that if a lawyer had uncertainty regarding meaning of the language in the December 17, 1998 press release, and that lawyer is charged with the responsibility for ascertaining the fairness of the settlement, the lawyer would have then had a responsibility to investigate further. (Tr. 759-60)
- The absence of any confirmatory discovery about insurance in a settlement that is now said to have been driven by the policy limits of that insurance likewise not only bears directly on materiality and reliance but also bears on the fee-driven mindset of plaintiffs' counsel *as a group* in 1998/1999. Defendants are entitled to the testimony of *all* counsel who participated in the prior litigation on this point, and the testimony of Messrs. Haley and Francis that they never asked any other plaintiffs' counsel what discovery they had performed to confirm the fairness of the settlement (Tr. 617, 626, 726-27) is probative on the group mindset.
- As is Mr. Francis's testimony that he was never told, did not know, never asked any of the other plaintiffs' lawyers, never asked any MedPartners representative, and never asked any AIG representative what the amount of insurance was. (Tr. 718-20, 723-24, 732, 741-42, 743-44, 752)
- As is Mr. Haley's testimony about "word on the street" and that the settlement was a hot topic in the Birmingham legal community in 1999. (Tr. 613-14) Defendants will be entitled to argue that a lot of lawyers had a lot of incentive not to rock the boat, and Mr. Haley's testimony goes directly to that issue.

Putative Class Counsel are witnesses against the putative class on the existence of a misrepresentation. That Plaintiffs' misrepresentation claim has always been a moving target (Tr. 600, 603-05, 608-10, 654-55) underscores that it is entirely circumstantial. There is *no* evidence of *any* statement by AIG or MedPartners concerning the amount of insurance other than (a) MedPartners' various public disclosures and (b) Jack Newman's true-when-made $50 million statement in the summer of 1998. Defendants will be entitled to ask *each* plaintiffs' lawyer from 1998/1999 if s/he is aware of *any* false statement about insurance made by *any* of the Defendants to them or to *any* of the other plaintiffs' lawyers they knew of in the 1998 MedPartners Securities Litigation. Both Messrs. Haley and Francis have acknowledged that no one on behalf of MedPartners or any of the AIG Defendants made *any* representations to *any* plaintiffs counsel regarding the extent of the excess insurance. (*See* Tr. 612-13; Francis 76-77; Tr. 724-25, 752; Haley 279-80; Tr. 746, 747, 752)

Putative Class Counsel are necessary witnesses on the statute of limitations. At the Hearing, Putative Class Counsel repeatedly made the point that the alleged fraud was ongoing and was not discovered until 2003 when Mr. Haley "found" the AISLIC Policy. (Tr. 944, 945) Given this claim that Mr. Haley "discovered the fraud," Defendants will be entitled to cross examine him before the jury on tolling of the statute of limitations if the case survives summary judgment. Likewise, Mr. Somerville's repeated assertions that Mac Crawford's 2000 testimony — in a deposition Mr. Somerville himself took — was "part of the fraud" (Tr. 1037-41) and his insistence that his own interpretation of Mr. Crawford's "total coverage" answer is the only correct one (*id.*), injected him as a player on the issues of concealment and tolling of the statute of limitations.

It is clear that Putative Class Counsel must serve as witnesses to provide the type of necessary information highlighted above. Furthermore, this evidence illustrates that much of this testimony will be adverse to the interests of the putative class. The Alabama Supreme Court has held that an attorney is disqualified if he *or a member of his firm* will be called to testify against the client, *Ex parte Brown*, 551 So. 2d 1009 (Ala. 1989), or on a central matter in the case, *Ex parte Sanders*, 441 So. 2d 901 (Ala. 1983); *see also Harkins & Co*. v. *Lewis*, 535 So. 2d 104, 112 (Ala. 1988) ("A lawyer may continue his representation of his client even when he anticipates being called as a witness other than for his client, *so long as it is not apparent that his testimony is or may be prejudicial to his client.*") (emphasis added).

Putative Class Counsel are witnesses to their own lack of disclosure to Judge Wynn. As set forth above, the Hare Wynn and North Firms did not submit the affidavits of hours worked that Judge Wynn had ordered on May 10, 1999, and they did not correct the statement in the Selinger/Cauley Joint Affidavit that *all* Plaintiffs' Counsel *had* submitted such affidavits. Whether or not the May 10 Order was actually directed to the Hare Wynn or North Firms (they were not listed as having been copied, but Steve Schulman, who was the Hare Wynn Firm's co-counsel in the dismissed-and-on-appeal *Lauriello I* action, *was* listed), it is indisputable that the Firms received the bulk of a $2.5 million fee based on an inaccurate statement to Judge Wynn as to what had been submitted — an untrue statement the Firms made no effort to correct. Defendants will be entitled to adduce this evidence to counter or mitigate Plaintiffs' assertions, *inter alia*, that counsel present in the courtroom had a duty to correct the misstatements about available insurance made by counsel for plaintiffs to Judge Wynn at the fairness hearings.

2. In the Circumstances of This Case, Rule 3.7 Disqualifies the Testifying Lawyers' Entire Firms, Not Merely the Testifying Lawyers Themselves

That counsel's testimony will be adverse to the class is a complete answer to the argument that the case can be tried by other lawyers from the Hare Wynn and North Firms even if

Messrs. Haley and Francis must testify.[26] *Ex parte Brown*, *supra.* In addition, because what these lawyers did and/or failed to do in the underlying case will be directly at issue in this case, the reputations of the firms will be at issue when this case is litigated on the merits. As Professor Morgan testified (Tr. 867-71, 911, 943) the need to defend the Firms' reputations will be a "material limitation" on their representation within the meaning of Rule 1.7, so the Firms *cannot* take advantage of the savings provision of Rule 3.7(b).[27] Pursuant to Rule 3.7(b), the need for Messrs. Haley and Francis to testify presents a "material limitation" that prevents the whole of the Hare Wynn Firm and North Firm from representing the putative class.

Accordingly, no lawyer from the Hare Wynn or North Firms is adequate to represent the putative class.

3. The Lawyer-Witness Issue Must Be Addressed Now

The lawyer-witness issue must be addressed at this stage and cannot be put off until the time of trial. If, as we have argued, the witnesses will be adverse to the Class, then both they *and their firms* are barred by Alabama law from trying the case. If the class is certified, how on earth can the case be prepared for trial with the ever-looming possibility that ultimately there will be no one to try it for the class? As Professor Morgan testified (Tr. 885-87), the issue is whether the class can be adequately represented by lawyers subject to such deficits, and *that* is an issue that is squarely before the Court right now.

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[26] Since Mr. North was as involved as Mr. Francis in the 1998 MedPartners Securities Litigation and is likewise a potential witness here on the same issues, it is not clear that there are any other lawyers associated with the North Firm potentially available to participate in a trial of this matter.

[27] Rule 3.7(b) provides that "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, *unless precluded from doing so by Rule 1.7 [general conflict of interest rule] or Rule 1.9 [conflict of interest involving former client]*." ALA. R. PROF. CONDUCT 3.7(b) (emphasis added).

III.

THE NAMED PLAINTIFFS FAIL THE ADEQUACY REQUIREMENT OF RULE 23(A)(3) DUE TO CONFLICTS WITH ABSENT CLASS MEMBERS, AND THEIR CLAIMS ARE NOT TYPICAL OF THOSE ABSENT CLASS MEMBERS

A. There Are Inherent Conflicts Between and Among the Common Stock, TAPS, and Tender Offer Subclasses

Tellingly, Plaintiffs have made barely any attempt to counter the argument that their proposed representatives have inherent conflicts with absent class members and are thus inadequate to represent the class under Rule 23(a)(4). *See Cutler* v. *Orkin Exterminating Co.*, 770 So. 2d 67, 71 (Ala. 2000) (class action foreclosed "where there is a conflict of interest between the named plaintiff and the members of the putative class").[28] James O. Finney, Sam Johnson, and the City of Birmingham Retirement and Relief System each assert claims based solely on their former ownership of MedPartners common stock. (FPFF ¶¶ 372-75) However, the current proposed class, like the class in the 1998 MedPartners Securities Litigation, contains three distinct subgroups: common stockholders, TAPS owners, and Talbert tender offer participants. (FPFF ¶¶ 100, 366) These groups are prone to conflicts. For example, Defendants are entitled to argue that Plaintiffs did not suffer any damages — an essential element of their fraud claim — due to the weakness in their underlying securities case, and the three distinct subgroups of the putative subclass have different abilities to respond to this argument. (*See* Def. Pre-Hearing Mem. 74-75) Common shareholders are weakest in this respect, as they have a higher burden of proof than the other subclasses and had a case (*Lauriello I*) already dismissed by motion in the underlying matter. (*See id.*; FPFF ¶¶ 57-79) TAPS and Talbert class members have the incentive to highlight this weakness so as to maximize their portion of any recovery, while common shareholders have every reason to hide it. This creates an inherent conflict that requires each group to have sepa-

[28] As set forth in our Pre-Hearing Memorandum (at 79-81), the issue is also one of typicality under Rule 23(a)(3).

rate representation to execute — or at the very least *consider* — alternative strategies. That is among the reasons that both the state and federal courts in the 1998 MedPartners Securities Litigation appointed different counsel to represent the different subclasses. Because the putative class has no such representation in its proposed representatives, it fails this prong of the adequacy requirement under Rule 23(a)(4).

Plaintiffs suggest that this problem can be solved by simply maintaining the allocation percentages from the 1998 MedPartners Securities Litigation. (Tr. 104; Pl. Pre-Hearing Br. 4, 111) That proposal, however, is unworkable and, depending upon the amount of any judgment in this case, could result in plaintiffs from some of the subclasses receiving more than 100% of their losses.

A close examination of the 1998 allocation plan makes this clear. Under that plan, each of the three subclasses was allocated a certain fraction of their loss as calculated by the claims administrator. (FPFF ¶¶ 392-93) This fraction varied depending on what subclass the member belonged to: common stockholders recovered about 3% of their "Recognized Loss," while TAPS members recovered approximately 29%, and Talbert members recovered approximately 47%. (FPFF ¶ 393) Plaintiffs claim that they have suffered over $3 *billion* in damages in this case, *over fifty times* the original settlement. (6/4/2004 First Amended Class Action Complaint ¶¶ 82, 86) Suppose — against the merits — Plaintiffs ultimately succeed in this case. If their recovery exceeds $62 million, then each member of the Tender Offer Class will, under the pre-existing allocation plan, receive an amount that, when combined with his/her original recovery ***exceeds 100% of that class member's actual damages.*** (FPFF ¶ 396) If the recovery reaches $134.2 million, so will each member of the TAPS class. (FPFF ¶ 397) An allocation plan that results in certain subclasses recovering more than their actual losses is, on its face, untenable.

This math exercise leads to at least two conclusions. First, the fact that this supposedly unitary class so easily breaks into pieces ***by itself*** debunks Plaintiffs' theory of the class as an entity, which is essential to many of its arguments for certification, even if the argument had any legal merit to begin with. The class does not "sink or swim" together, as Plaintiffs contend. (Tr. 129) Rather, it has component parts, and one part might enjoy a windfall while the other might not even come close to recovering its alleged damages. Second, if Plaintiffs recover damages in excess of $62 million it is *certain* that their inherent intra-class conflicts will surface in this case. For this reason, again, each of the three groups needs its own representative to protect its interests and to advocate for the best outcome *for that group*. If the class is successful, how will it handle any extra recovery that comes its way? James Finney, Sam Johnson, and the City of Birmingham have absolutely no incentive to advocate for outcomes that benefit TAPS or Tender Offer members in particular. Indeed, they have no incentive even to consider those outcomes. Accordingly, they are inadequate to represent any class that includes such persons.

B. Any Class That Is Certified Cannot Include Persons Who Did Not Claim in 1999

As demonstrated in Defendants' Pre-Hearing Memorandum (Part V.B), Plaintiffs' proposed "Subclass B," consisting of individuals who did not submit claims in the 1998 MedPartners Securities Litigation, cannot be certified for three reasons. First, a subclass must independently meet the requirements of Rule 23,[29] which includes the "fundamental requirement" that its named representative belongs to that subclass. *Johnson* v. *American Credit Co.*, 581 F.2d 526, 532 (5th Cir. 1978). That requirement has not been met here because no proposed class representative is a non-claimant. (FPFF ¶¶ 373-75) Second, the interests of claimants will inevitably conflict with those of non-claimants. Claimant putative class members have an incentive to

[29] *Houston County Health Care Authority* v. *Williams*, 961 So. 2d 795, 812 (Ala. 2006).

argue that non-claimants are not entitled to any recovery because their failure to receive potential settlement funds was a product of their own inaction or choice, not any alleged fraud of the Defendants. Given this tension, proposed claimant representatives cannot adequately represent non-claimants under Rule 23(a)(4). Third, claimants' fraud claims are not typical of non-claimants' fraud claims, and the proposed subclass therefore fails under Rule 23(a)(3)'s typicality requirement.

Plaintiffs attempt to shrug off these arguments. They assert that they are proposing the subclasses "purely for administrative ease" reasons, and that the subclasses are "not a big deal." (Tr. 113) But that is no answer to these three arguments at all.

The only substantive response to these points provided by Plaintiffs so far is the suggestion, made at the Hearing, that there were no conflicts between the proposed subclasses because putative class members all have an incentive to maximize the total recovery for the entire putative class. (Tr. 103-05) That, however, is untrue. It does not take much foresight to consider that settlement negotiations in this case could involve offers to settle for a sum certain that would then incentivize each subclass to argue that the other's recovery should be minimized or eliminated altogether. Given that possibility, separate named representatives and counsel for each proposed subclass are essential.

C. Plaintiffs Have Conceded that The Class Impermissibly Includes Individuals Who Opted Out from the Settlement Class in 1999

In their responses to Defendants' Requests for Admission, Plaintiffs defined the putative class in such a way as to include opt-outs from the 1998 MedPartners Securities Litigation. (*see* Def. Pre-Hearing Br. 79) At the certification hearing, Plaintiffs conceded that the class, if certified, cannot include opt-outs. (Tr. 115-16) On this point, Plaintiffs are correct. No class can be certified that includes those individuals.

CONCLUSION

The motion for class certification should be denied.

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