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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

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

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CIRCUIT COURT OF
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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CASE NO. CV-2003-6630-TK

JOHN LAURIELLO, individually; and
JAMES O. FINNEY, JR., SAM JOHNSON,
and CITY OF BIRMINGHAM RETIREMENT
AND RELIEF SYSTEM, for themselves,
individually, and on behalf of a class of all
others who are similarly situated,

Plaintiffs,

vs.

CVS CAREMARK CORPORATION; AMERICAN
INTERNATIONAL GROUP, INC.; NATIONAL UNION
FIRE INSURANCE COMPANY OF PITTSBURGH, PA.;
AIG TECHNICAL SERVICES, INC.; and AMERICAN
INTERNATIONAL SPECIALTY LINES INSURANCE
COMPANY,

Defendants,

and

VIRGINIA GREENE HOFFMAN,

Intervenor.

PLAINTIFFS' POST-HEARING BRIEF IN FURTHER SUPPORT OF MOTION FOR CLASS CERTIFICATION

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June 15, 2012

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INTRODUCTION TO PLAINTIFFS' POST-HEARING BRIEF

This is the final written summary of Plaintiffs' positions in regard to their motion to certify the fraud claim (first pleaded in October 2003) to proceed on a class action basis. We will not repeat arguments and citations already set out in "Plaintiffs' Brief in Support of Motion for Class Certification," filed on May 4, 2012. This brief primarily addresses issues raised in Defendants' opposition brief of May 15, 2012, and during the class certification hearing of May 30 - June 4, 2012.

However, in an attempt to aid the Court in resolving the certification issue, Plaintiffs will address each Rule 23 factor, even those not in dispute (such as numerosity). Counsel recognize that this Court has the duty of "rigorous analysis," and everyone presumes that the party aggrieved by the certification order to come will exercise the appeal of right to the Alabama Supreme Court granted by Ala. Code § 6-5-642. Thus, in order to demonstrate its "rigorous analysis," and to aid the appellate court's understanding and resolution of the contested issues, we anticipate that this Court will prepare a rather lengthy and detailed written order.

So, in this post-hearing brief, Plaintiffs attempt to outline and organize the factors and issues in a manner that we hope is useful to the court in drafting its ultimate written opinion on the certification issue. That is, we have attempted to create and follow an outline that lists each factor that a "rigorous analysis" must address. Also, we strive to be as succinct as possible, believing this will be more helpful to the Court than repeating every possible piece of evidence that we believe might be relevant.

On May 15, 2012, with their opposition brief, Defendants filed a very long set of 389 proposed findings of fact. Plaintiffs are ready to reply to them, line by line, and provide

alternative and additional findings, if and when the Court directs. At this point, we do not know if the Court intends that its ultimate order will use a format like this - with numbered findings of fact, then numbered conclusions of law. We mention this here because we do not want Plaintiffs' silence to be construed as an admission of the correctness of each of Defendants' 389 proposed findings of fact.

In Plaintiffs' view, the only real issue in dispute is the question of "Individual Reliance." Once this Court decides that core issue, everything else falls into place to either grant or deny the motion for class certification. The questions raised about the prior conduct of Plaintiffs' counsel are merely an attempt to distract the Court from the core issue; and, none of those lawyer-conduct issues (singularly, or in combination) are significant enough to prevent certification of the fraud claim, once the Court rejects the Defendants' position on the issue of "Individual Reliance."

Everyone admits that this is a "unique" case of first impression. Neither side (nor their experts) have found any legal authority (court opinion, treatise, article, etc.) addressing the scenario of an alleged fraud on a class - - - e.g., a claim of fraud-in-the-settlement of a class action settlement. Thus, to the extent existing legal authorities provide guidance, this Court is left to choose the category of authorities it finds to be most closely-analogous to the fraud-on-the-class allegations presented herein. This is where the parties part ways in their analytical dispute over the core issue of "Individual Reliance."

Plaintiffs contend that the certification issues, e.g., the Individual Reliance issue, must be viewed in light of the truly unique fact that a certified class already existed and that it was the class that was defrauded. Once the Court agrees with the concept that **it was the class itself that was defrauded**, then there is no other significant hurdle to clear before deciding to certify the

fraud claim to proceed as a class action claim.[1]

Plaintiffs urge the Court to reject the Defendants' position on Individual Reliance. The existing body of case law, relied upon by Defendants, dealing with individual fraud scenarios are simply not analogous, applicable, or helpful to the case at bar. None of those cases are even remotely similar to a fraud on a class or a fraud on an organizational entity (such as a corporation).

It is undisputed that Alabama law, adopting federal and United States Supreme Court authority, provides that a certified class is a legal entity, separate from the class members. Therefore, Plaintiffs urge that the most closely-analogous line of existing cases is that dealing with fraud on an organizational entity, such as a corporation. In that scenario, fraud committed on the entity's agents is fraud on the entity itself (even if uninvolved members or employees of the entity actually know the truth). The application of general principles from principal-agent law and from fraud-on-an-entity cases leads logically to a holding that fraud on a class's agents (court-appointed class counsel) and fiduciary (the court) proves fraud on the class itself, without each one of the thousands of class members having to prove individual fraud and Individual Reliance.

On the other hand, the adoption of the Defendants' position (i.e., that this case is no different from any other run-of-the-mill individual fraud case) and the rejection of class certification leads to the absurd result that a class and its members can be defrauded with

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[1] These are not the same arguments and issues that were presented in 2004 which resulted in the certification order of January 28, 2005. Even though a certified class exists, the Supreme Court directed this Court to conduct a rigorous analysis of each claim or cause of action (our misrepresentation and suppression counts first pleaded in October 2003), and that is what the parties and the Court are committed to be doing (e.g., in the five-day hearing that just concluded).

impunity. If a defrauded class cannot pursue its fraud claim on a class basis, then the fraudsters get off "scot free." From a public policy perspective, this would be disastrous. There would be no incentive for class action defendants to be honest with the court and opposing counsel. Instead, defendants could lie about their assets and insurance coverages to induce a lowball settlement; then, even if caught in their lies, nothing significantly adverse will happen because no fraud-in-the-class-settlement can be certified as a class claim. At most, the unmasked fraudster would face only a few scattered individual actions,[2] which would be far cheaper for the fraudster to settle than what a fair settlement of the original class action would have cost the defendant.

This terrible result is not required by any existing case law or other legal principles. There apparently is no reported case or other authority involving these kind of facts where a class action defendant is alleged to have committed fraud to induce a settlement of a class action at an amount much lower than it would have been had the truth been known.[3] Plaintiffs contend that the "ordinary" individual fraud cases cited by Defendants are not analogous authority; but, instead, the most closely-analogous legal principles derive from principal-agent law and from cases dealing with fraud on organizational entities such as corporations.

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[2] And, really, how would an attempted individual action work? How would an individual class member, who had given up his individual claim by not opting out, prove individual reliance, without proving the class's reliance? And, how would an individual class member prove his pro rata portion of fraud-in-the-settlement damages without proving what the class would probably had settled for had the truth been known?

[3] This fact demonstrates that certification of this fraud claim for class treatment will not be opening the floodgates to new litigation. This is apparently a very rare, perhaps unique circumstance unlikely to be repeated.

ARGUMENT

EACH OF THE NECESSARY RULE 23 FACTORS EXISTS

I. THE CLASS IS ASCERTAINABLE

Assuming, *arguendo*, that this Court declared to the Defendants its intent to certify the fraud claim[4] as a class action claim, the Defendants would not deny that the class to prosecute that claim is a definable, identifiable, and ascertainable class. The Defendants jointly agreed with the Plaintiffs in 1999 that a class existed (whose membership then is the same as today's proposed class) and that membership can be defined and ascertained. The Supreme Court held that CVS is estopped to deny the continued existence of the 1999 class. *Ex parte Caremark RX, Inc.*, 956 So.2d 1117, 1126, n. 4 (Ala. 2006).[5]

We know that our proposed class definition is workable, because it worked in 1999. Class administrators Gilardi & Co. mailed almost 79,000 notices, received over 23,500 claims, and verified and approved almost 18,000 claims in 1999.[6]

Defendants have pointed out that some 1999 class members (apparently 79) opted out in 1999. We agree that those opt outs should be excluded for purposes of this fraud claim. Thus,

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[4] As in our May 4th brief, we will speak of the misrepresentation and suppression counts in the singular, as the "fraud claim."

[5] Plaintiffs' position is that AIG was a signatory to and joint proponent of the 1999 class settlement, along with CVS. See Plaintiffs' May 4, 2012, brief at pp. 28-34, 113-17. So, to whatever extent the existence of the 1999 class is important to the certification of the fraud claim at issue, AIG is estopped to the same extent as CVS. Ultimately, the theory of estoppel is not critical, because the history of the 1999 class and the undisputed procedural facts of 1999 prove certain elements, such as ascertainability, whether or not the Court categorizes this as an "estoppel" or simply as an undisputed, proven "fact."

[6] See May 4, 2012, brief at p. 47.

we propose a modification to the class definition that was presented in our May 4, 2012, brief. As modified, Plaintiffs request that the class to prosecute this fraud-in-the-settlement claim be defined as follows:

> All Persons who (I) purchased MedPartners, Inc. ("MedPartners") common stock [including, but not limited to, through open market transactions, mergers, or acquisitions in which MedPartners issued common stock, acquisition through the Company's Employee Stock Purchase Plan ("ESPP"), and any other type of transaction in which a person acquired one or more shares of MedPartners stock in return for consideration] during the period from October 30, 1996, through January 7, 1998, inclusive (MedPartners employees who purchased shares through the ESPP in January 1998 being deemed to have purchased their shares on December 31, 1997); (ii) purchased call option contracts on MedPartners common stock during the period October 30, 1996, through January 7, 1998, inclusive; (iii) sold put option contracts on MedPartners common stock during the period October 30, 1996, through January 7, 1998, inclusive; (iv) purchased MedPartners Threshold Appreciation Price Securities ("TAPS") in the September 15, 1997, offering or thereafter through January 7, 1998; or (v) tendered shares of Talbert Medical Management Holdings Corporation to MedPartners between August 20, 1997, and September 19, 1997 ("The Settlement Class"). Excluded from this class definition are those persons or entities who exercised, in 1999, their right to opt out of the proposed $56 million settlement of the 1998 MedPartners Securities Litigation.

II. THE SUBCLASSING SUGGESTION

Purely as an administrative tool, Plaintiffs suggest creating Subclass A (those who filed approved claims in 1999, approximately 18,000 persons and entities) and Subclass B (the 1999 class members who did not file claims). See May 4, 2012, brief at pp. 4-5, 62-64. Subclass A members have already had their claims approved and the dollar amount of their losses determined. They should not have to file new claims, or do anything at all, in order to participate in any settlement or judgment fund in this fraud litigation. Otherwise, there are no differences or conflicts between the two proposed subclasses, so there is no barrier to having class

representatives from Subclass A representing both proposed subclasses.

However, Plaintiffs concede that this administrative issue can logically be tabled until a settlement or judgment fund is, in fact, created. Then, for claims administration purposes, the subclass issue can be decided at that time. That is, the subclassing suggestion does not have to be decided now, at this stage of the litigation. Class certification orders are interlocutory, *Mitchell v. H & R Block, Inc.*, 783 So.2d 812, 815 (Ala. 2000), and interlocutory orders are subject to revision at any time prior to entry of final judgment, *D. D. v. Calhoun County Dept. of Human Resources*, 81 So.3d 377, 380 (Ala. Civ. App. 2011).

"Conditional is actually a term that can be properly applied to all class actions. . . . [T]he court retains the authority to re-define or decertify the class until the entry of final judgment on the merits." *Ex parte Citicorp Acceptance Co., Inc.,* 715 So.2d 199, 203 (Ala. 1997), quoting with approval from *In re General Motors Pick-Up Truck Fuel Tank*, 55 F.3d 768, 792, n. 14 (3rd Cir. 1995) (emphasis added). "After entering an order under Fed. R. Civ. P. 23(c)(1) that an action may proceed as a class action, the court retains power to redefine the class. . . ." 6A Federal Procedure, Lawyers Edition § 12:293 (database updated June 2012). See also *Weitzner v. Sanofi Pasteur, Inc*., No. 3:11-cv-2198, 2012 WL 1677340, *6 (M.D. Pa. May 14, 2012) (same), and David F. Herr, Annotated Manual for Complex Litigation § 21.2 (2012 ed.) (database updated May 2012) (same).

Even though the suggested subclassing is a purely administrative matter that can be addressed at the end of the case, Plaintiffs do wish to briefly respond to a merits issue raised at page 78 of Defendants' May 15, 2012, brief. Defendants argue that those in proposed Subclass B suffered no legal injury at all because they did not file a claim and, thus, were not underpaid by

the lowball settlement.

First, this is purely a merits issue. The Court need not, and ought not, even consider this merits argument at the class certification stage. Whether or not those class members who did not file claims in 1999 can ultimately prove damages or not is not an issue that impacts any of the Rule 23 factors. Whether those in proposed Subclass B ultimately win or not, their claims are common, typical, etc. In fact, by arguing that *all* members of proposed Subclass B should be excluded from recovery, Defendants recognize that Subclass B claims should be litigated together in a class action because they are all in an identical legal position.

Second, to the extent any discussion of the merits is relevant at all (for example, to trial manageability concerns), Plaintiffs note herein their disagreement with Defendants' analogies. Contrary to Defendants' position, members of both proposed Subclasses were identically injured by the fraud-in-the-settlement. They were all members of the 1999 class, and the entire class was defrauded, not just those who ultimately filed approved claims. The $56M settlement was a settlement on behalf of the entire class, and the hypothetical higher settlement would have been, too. The settlement would not have been just on behalf of the undetermined persons who will, in the future, actually file a claim that gets approved by the claims administrator. At the time the case would have settled, both Subclass A members and Subclass B members would have been together in an identical legal position (e.g., because, at that moment in time, no one would know which class members would later follow through with filing a verifiable claim). So, Defendants' "merits" argument against Subclass B has no substance, anyway. And, if Defendants continue to press this defense, it can easily be presented as a subclass-wide defense, and it presents no manageability problems to handling this case as a class action.

III. NUMEROSITY IS NOT CONTESTED

"The test is whether the number of members in the class is so numerous as to make joinder impracticable. Ala. R. Civ. P. 23(a)(1); *State Farm Fire & Cas. Co. v. Evans*, 956 So.2d 390 (Ala. 2006). . . ." American Bar Association Survey of State Class Action Law: Alabama § 5 (database updated Dec. 2011). From the administration of this class's $56M settlement in 1999, we know there are about 80,000 potential class members, and we know that about 18,000 actually filed claims that were verified and approved. Thus, numerosity is proven and is uncontested.

IV. COMMONALITY, TYPICALITY, AND PREDOMINANCE ARE OVERLAPPING FACTORS

Ala. R. Civ. P. 23(a)(2) and (3) sets out the factors of: "there are questions of law or fact common to the class;" and "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Similarly, Rule 23(b)(3) asks the court to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." As to these related factors, see generally our May 4, 2012, brief at pp. 118-25, 145-46.

"Commonality requires only that there be common questions of law or fact. . . . [W]here essentially identical representations are made at different times to different class members but share a common thread and are redressable under the same theory of recovery, the test of commonality may be met." ABA Survey, *supra*, at Alabama § 5. "Typicality is met if the named plaintiff's alleged injury 'arises from or is directly related to a wrong to a class and that wrong to

the class includes the wrong to the plaintiff.' *Warehouse Home Furnishing Distrib., Inc. v. Whitson*, 709 So.2d 1144, 1149 (Ala. 1997)." *Id*. "Rule 23(b)(3) encompasses the tests of predominance. . . . The test of predominance has been described as 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' *Voyager Ins. Cos. v. Whitson*, 867 So.2d 1065, 1071 (Ala. 2003). Under Rule 23(b)(3), putative class representatives must demonstrate that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ." *Id*.

Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551, n. 5 (2011), repeats an oft-stated acknowledgment that "the commonality and typicality requirements of Rule 23(a) tend to merge." The Court also noted that the tests for commonality and typicality "also tend to merge with the adequacy-of-representation requirement," as it concerns the proposed class representatives. *Id*. "Each subsection of Rule 23(b) overlaps significantly with the commonality requirements." 1 William B. Rubenstein, Newberg on Class Actions § 3:27 (5th ed.) (database updated Nov. 2011). Rule 23(b)(3) takes the same commonality test from 23(a), and just adds to it by requiring that those common questions *predominate* over individual questions. *Id*. "Due to the similarities between the two requirements, . . . courts will often treat the application of Rules 23(a)(2) and 23(b)(3) together." *Id*. "Both commonality and typicality measure the degree of interrelatedness between the claims in a class action. . . . In order for this similarity to exist, the class representative's claims must share some common question of law or fact with the class members' claims. . . . The questions that are common between the class representative and the class members are likely to be common to all class members. In this sense, a finding of typicality logically presupposes a finding of commonality. . . . Because of the overlap between the two

requirements, some courts address typicality and commonality together." *Id*. at § 3:31. The requirements of commonality, typicality, and predominance all turn "on the existence of common questions among the proposed class members . . . ." *Id*. at § 3:25. "Courts have regularly noted these relationships. . . ." *Id*. "The plaintiff must also show there are common questions of fact or law between all members of the class. . . . [T]he courts have found that this factor blurs with typicality. . . . Courts sometime blur typicality with the requirement that the named plaintiff be an adequate representative of the class." Gregory C. Cook, The Alabama Class Action: Does It Exist Any Longer? And Does It Matter, 66 Ala. Law. 289, 291 (July 2005).

Everything about the fraud claim is common. Suppression, by definition, is common. Defendants never told anyone about the unlimited policy. To the extent the defense is the content of press releases and SEC filings, all those written communications were identical vis-a-vis the class members, their lawyers, and the general public. The misrepresentations were common. On the merits (not to be decided at this stage), Plaintiffs will contend that Defendants are liable for the common and uniform misrepresentations told to Judge Wynn ("We got all of the insurance," for example). The representations to Plaintiffs' counsel (e.g., the $50M of insurance) were common. Damages are identical in nature and they vary only as to dollar amounts (which is just a mathematical formula). So, not only are there common questions that predominate, the questions are actually identical, and there are no individual questions (except as to dollar amount of loss, which varies for each class member).

Defendants' objection to typicality is that the three proposed class representatives were common shareholders and the overall class includes small numbers of TAPS purchasers and Talbert option purchasers. See Defendants' May 15, 2012, brief at pp. 80-81. As explained

during the first day of the hearing (May 30, 2012), any conflicts between those three groups were resolved in the 1999 class settlement. Those three groups, or subclasses, with their lawyers, and with the joint participation of these Defendants, settled their differences in Judge Wynn's court. Judge Wynn's orders engraft those settlements and those issues are now law of the case or res judicata.

Here, in 2012, we are not re-litigating the underlying securities fraud case. The claim at issue is a fraud-in-the-settlement claim. That claim is being pursued on behalf of the entire 1999 class and the members of that class. The fraud-in-the-settlement did not vary, depending upon whether one owned TAPS or common stock. The fraud touched all class members identically. Those three groups (common stock, TAPS, Talbert) were merged into one class when this class was certified in 1999. They were one single entity when the fraud was perpetrated and when it was finally consummated with final court approval in July 1999. For purposes of the fraud-in-the-settlement claim, it makes no difference whether one originally owned common stock, or TAPS, or Talbert options.

Those three groups agreed in 1999 to a formula that defines how class action recoveries are to be distributed. That formula is embedded in 1999 court orders and is law of the case or res judicata. There are presently no conflicts between these three types of owners in regard to this fraud-in-the-settlement claim.

Also, whether the class member's underlying securities fraud claim was originally based on state law, on § 10b5, or on § 11 of the federal Securities Act is completely irrelevant today in this fraud-in-the-settlement claim. The present fraud claim is based on Alabama's common law of fraud. All of the class members have an identical Alabama fraud claim based on identical

Alabama fraud law. The underlying differences between § 10b5 and § 11 are now totally irrelevant. The potential differences in the merits of those underlying claims are also irrelevant because AIG and CVS were proponents of the 1999 class settlement, which settlement determined that each of these three groups had valid claims.

Conflict of Laws. Defendants (see May 15, 2012, brief at pp. 35-38) assert that common questions do not predominate because they argue that the substantive fraud laws of each of the fifty states must apply to this case. Plaintiffs contend that Alabama law applies to the whole case, the entire class, and each class member, and they address this Conflict of Laws issue separately in section IX, *infra*.

Individual Reliance. Defendants (see May 15, 2012, brief at pp. 27-35) also dispute preponderance on the ground that each class member must prove his/her/its own individual reliance. In other words, Defendants contend that this is an ordinary individual reliance fraud case, no different from any other run-of-the-mill fraud case. Plaintiffs argue that this case is very, very different, and, in fact, is literally unique because it involves fraud on a class. Thus, individual class member reliance is not a necessary element of the claim (and, even if it is, such can still be proven on a class-wide basis). This issue [Individual Reliance] is the gist of the entire certification issue. Therefore, Plaintiffs reply separately to this determinative issue, Individual Reliance, in section X, *infra*.

V. THE THREE PROPOSED CLASS REPRESENTATIVES ARE ADEQUATE

Ala. R. Civ. P. 23(a)(4) requires a finding that "the representative parties will fairly and adequately protect the interests of the class." The fraud claim is common to each class member, the three proposed representatives included. Their claims are also typical of every other class member's claim. See our May 4, 2012, brief at pp. 125-27. Pages 45-47 of that brief summarize the deposition of these three gentlemen. They are each respected and experienced professionals and businessmen. They understand the claims, and they are willing and available to be deposed, to testify, to attend court, and to counsel with the class lawyers. "The named plaintiff should be able to understand the underlying theory of the claims and have no conflict of interest with absent class members. *Warehouse Home Furnishing Distrib., Inc. v. Whitson*, 709 So. 2d at 1149; *Cutler v. Orkin Exterminating Co.*, 770 So. 2d 67 (Ala. 2000)." American Bar Association Survey of State Class Action Law: Alabama § 5 (database updated Dec. 2011).

These three have no legal conflicts with the claims of the class or its members. The distinctions between owners of common stock (which they are), TAPS, and Talbert options are no longer relevant, as discussed above. And, the fact they are all Alabama residents is not a relevant factor because only Alabama law will apply to this case (see section IX, *infra*, as to Conflict of Laws issues).

And, no conflict will be created by the use of the two suggested subclasses: A (of which they would be members) and B (those who did not file claims in 1999). This is not a "limited fund" class action. Members of suggested subclass A would have no incentive to exclude from the class members of suggested subclass B. A larger class does not reduce the dollar amount of a subclass A member's loss - - - which amount was already determined by the administrator in

1999 and which determination is law of the case or res judicata. In fact, members of subclass A should desire the class to be as big as possible so as to further impress the jury with the magnitude of Defendants' wrongdoing and increase the potential for punitive damages. Because there is no conflict of interest between members of the suggested two subclasses, members of subclass A are perfectly adequate and competent to represent the joint, unified, and identical legal interests of *all* class members, meaning those in subclass A as well as those in B. There is no need to appoint separate representatives or lawyers for subclass B because A and B have no conflicts of interest.

Defendants' only other objection to the adequacy of the representatives is their continued assertion that issues of Individual Reliance are pertinent, and that portions of their personal stories vary among one another and with those of absent class members. Again, this overarching issue of Individual Reliance is addressed below, in section X.

VI. THE THREE PROPOSED CLASS COUNSEL LAW FIRMS ARE ADEQUATE AND ARE NOT CONFLICTED

"The adequacy of counsel prong of Rule 23(a)(4) asks whether counsel are 'qualified, experienced and generally able to conduct the litigation' and whether counsel will 'vigorously prosecute the interests of the class.' These standards are easily met, with members of the bar in good standing typically deemed qualified and competent to represent a class absent evidence to the contrary. The fact that proposed counsel has been found adequate in other class actions is persuasive evidence that the attorney will be adequate in the present action." 1 William B. Rubenstein, Newberg on Class Actions § 3:72 (5th ed.) (database updated Nov. 2011). "Isolated ethical violations ordinarily will not preclude counsel from representing a class. . . ." *Id*. at §

3:78.

"Courts generally discourage rigid application of disqualification rules in class action cases because of the nature of class representation and the importance of retaining counsel with the most experience on the case. [*Sharp v. Next Entertainment, Inc*. (2008) 163 CA4th 410, 434, 78 CR3d 37, 56 ('In the realm of class actions, the rules of disqualification cannot be applied so as to defeat the purpose of the class proceedings'); *Lazy Oil Co. v. Witco Corp*. (3rd Cir. 1999) 166 F3d 581, 590; *In re Agent Orange Prod. Liab. Litig*. (2nd Cir. 1986) 800 F2d 14, 19]." Paul W. Vapnek, Mark L. Tuft, Ellen R. Peck, and Justice Howard B. Wiener (Ret.), California Practice Guide: Professional Responsibility Ch. 4-B, ¶ 4:157.30. *White v. Experian Info. Solutions, Inc*., 803 F. Supp. 2d 1086, 1103 (C.D. Cal. 2011), says: "Instead of mechanically applying traditional disqualification rules to class action cases, the '*Agent Orange*' and *Lazy Oil* opinions instruct courts to conduct a balancing test, weighing the interest of the class in continued representation by experienced counsel against any actual prejudice incurring to the objectors from being opposed by their former counsel. *Lazy Oil*, 166 F.3d at 590; *In re 'Agent Orange,'* 800 F.2d at 18-19. This pragmatic approach makes sense to the instant Court."

Defendants devote a substantial portion (pp. 38-72) of their May 15, 2012, opposition brief to the listing of various alleged ethical lapses on the part of the lawyers in the Hare, North, and Somerville law firms.[7] Analyzed separately, in succession, the Court will find that none of the Defendants' ethical violations "stick." Thus, the combination of multiple baseless allegations does not create any sort of "cumulative" error, either. That is, zero plus zero plus zero is still

[7] By contrast, Defendants devote only eight pages (27-35) to what is the "real" issue: Individual Reliance.

zero.

In this section, we attempt to quickly summarize in writing our oral responses made to these charges during the five-day certification hearing. We again assert that these "lawyer attacks" or "ethical charges" are a sideshow, designed to distract the Court's attention from Defendants' indefensible conduct and from the only "real" issue, i.e., the reliance question.[8] In the worst case scenario, even if Defendants have touched upon one or two technical violations, none of those could rise to the level of a disqualification or a finding of inadequacy.

It is important to note that Defendants do not challenge the general competence and ethical reputation of these three firms and their lawyers. Instead, Defendants' ethical charges relate solely to these lawyers' prior conduct in the 1998 MedPartners Securities Litigation and in the later lawsuit between MedPartners and its former general counsel, J. Johnston.

For organizational purposes, and for the Court's ease in following along, we will respond to the ethical charges in the order in which they are addressed in Defendants' May 15, 2012, brief (pp. 38-72). Several of these issues or charges substantially overlap, and one could logically group them or count them in different ways. In attempt to list or categorize the Defendants' multiple charges, we count nine separate attacks, claims, or charges:

(1) The first specific ethical charge appears at pp. 41-48. First, Defendants argue that the Hare and North firms demonstrated their incompetence to handle class actions by failing to

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[8] By this, we are not meaning to counter-charge defense counsel with unethical conduct. Our intended point is that most of these alleged violations are so minor, remote, and tangential that they do not present any serious hurdles to class certification, and they do not warrant substantial research or effort on the Court's part.

discover the Defendants' fraud in the 1998 MedPartners Securities Litigation prior to the July 1999 final court approval. (Note, however, that these lawyers, along with John Somerville, were the persons who first *did* discover the fraud, in September 2003.)

We categorize this first charge as raising simply a question of ordinary negligence: i.e., did the North and Hare lawyers act as ordinarily prudent lawyers would have acted under similar circumstances? Before their case, the state court *Lauriello* case (*Lauriello I*), was dismissed, they did attempt to discover insurance. The Court heard extensive testimony from John Haley and Tim Francis. The Court has many documents before it from the 1998 MedPartners Securities Litigation, and it saw many of those used and explained during opening presentations.

This Court can easily make a finding of fact that the Hare and North lawyers, in 1998-99, did ***not*** act unprofessionally, unethically, negligently, or incompetently in their background role as putative class counsel for a putative class that was never certified and that was dismissed and on appeal. At pages 754-56 of the Hearing Transcript, Tim Francis summarized and explained, thusly:

> I believe it was incumbent to people who had been appointed plaintiff's counsel to do that [investigate the fairness of the settlement]. I also believe it was incumbent on the parties to the settlement to tell the truth. I went to Court both times. I believe I fulfilled my duty when I go to court and hear the lawyers, who are the best counsel sitting in the courtroom, tell the judge they're getting policy limits, and the company is going to go into bankruptcy if they don't settle the case. And I fulfilled my duty when I did that. And I did not believe anybody would go into court and lie to the judge about how much insurance they had or sit there mute while it was being told to the judge that. I think I fulfilled every duty I had by going to the courtroom and listening to these lawyers and tell the judge why the judge would approve the settlement. . . .
>
> We had hired who I believe to be the preeminent law firm in the United States to represent the class with us. And I was relying on them throughout the process. It turned out to be that Mr. Lerach was involved from day one about resolved this case. So I believe the duties to the class were fulfilled by my firm, the Hare Wynn firm and the Milberg Weiss firm throughout the process. . . .

> Yes, listening to him [Jack Newman] testify that he produced the $50 million. The Rules of Alabama Civil Procedure require supplementation to those responses if they are not true and accurate at all times. And I believe Mr. Lerach and every plaintiffs' lawyer has a duty to rely on fact that defendants would comply with the requirements of this Court and the requirements of the federal court.

We urge this Court to make a finding of fact that the Hare and North firms fulfilled their duties, in 1998-99, as putative class counsel to a putative class. It is also noteworthy that the evidence proves overwhelmingly that Defendants would never have disclosed the unlimited insurance prior to final approval of the $56M settlement. This Court was shown the many formal and informal requests that were, in fact, made - and rebuffed, e.g., by Richard George. If Defendants wanted to disclose, they were already under Rule 26(e) duties to supplement. Judge Wynn asked all proponents of the settlement for financial information. The list goes on and on. Thus, it is obvious that, in hindsight, there is absolutely nothing that the Hare or North lawyers could have done differently that could have altered the course of events in regard to the secrecy of the LMU.

And, if MedPartners had really been interested in following the law of disclosure, it would have disclosed the unlimited insurance within four days, back in October 1998, as required by SEC regulations. "Each issuer required to file periodic reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 must file current reports on Form 8-K when certain material events occur as required by the form. Form 8-K is generally required to be filed or furnished within four business days following the event that triggered the filing." Robert J. Wild, Corporate Compliance Series: Securities § 1:50 (2010-2011). The full form and instructions are at: www.sec.gov/about/forms/form8-k.pdf. Section 1 - Registrant's Business and Operations, Item 1.01 Entry into a Material Definitive Agreement, tells the public corporation

this (emphases added):

> (a) If the registrant has entered into a material definitive agreement not made in the ordinary course of business of the registrant, or into any amendment of such agreement that is material to the registrant, disclose the following information:
> (1) the date on which the agreement was entered into or amended, the identity of the parties to the agreement or amendment and a brief description of any material relationship between the registrant or its affiliates and any of the parties, other than in respect of the material definitive agreement or amendment; and
> (2) a brief description of the terms and conditions of the agreement or amendment that are material to the registrant.
> (b) For purposes of this Item 1.01, a material definitive agreement means an agreement that provides for obligations that are material to and enforceable against the registrant, or rights that are material to the registrant and enforceable by the registrant against one or more other parties to the agreement, in each case whether or not subject to conditions.

When a corporation is a party to major litigation and claims to be in dire financial straits, the purchase of unlimited liability insurance is surely "material." These Defendants set out from the beginning to hide the fact of unlimited coverage, and sworn testimony from Newman, George, and others prove that the cover-up existed from the beginning.

The Hare and North lawyers did not act negligently. In an attempt to make this issue into a question of professional ethics, Defendants (at p. 48 of its May 15th brief) cite Alabama Rule of Professional Conduct ("RPC") 1.7 (b), which references a lawyer's "material limitation." Defendants say that plaintiff lawyers' inclination to defend their conduct, in 1998-99, somehow would materially limit their ability to represent the class in 2012 in prosecuting this fraud claim. We simply fail to see any substance to this claim of material limitation in 2012, even if anything was done wrong in 1998-99. Nothing done by Hare or North prejudiced the rights of the 1999 class members or hindered their attorneys (class counsel) or the Court in their duties. Their ethical and competency duties, in 1998-99, will not be an issue before the jury at the merits trial. These questions are solely relevant to this pre-merits-trial certification hearing, where the Court

is the finder of fact.

Furthermore, receiving a fee did not alter the legal duties of the Hare and North firms in 1998-99. Whatever duties they had by virtue of filing the *Lauriello I* case in 1998 as a putative class action existed regardless of any later-paid fee or fee split. Alabama law (RPC 1.5(e)), see Plaintiffs' May 4th brief at p. 131, does not require that a split of a contingency fee be based on work done or accepting responsibility for the litigation - it requires only that the client consents. So, the receipt of the fee is legally insignificant. This issue about negligence in1998-99 will be decided in this hearing by this Court as the finder of fact. This will not be an issue before the jury and the Plaintiff lawyers will not be "defending" their 1998-99 conduct at the merits trial of this fraud claim. Thus, there is no potential for any RPC 1.7 "material limitation."

At page 143 of our May 4th brief, we argue estoppel. These Defendants were joint proponents of the 1999 class settlement. That included appointing those other [not Hare or North] named Plaintiff lawyers as Settlement Class Counsel. Defendants agreed and jointly represented to the Court that those other lawyers were adequate. Those other lawyers, the appointed Settlement Class Counsel, were in a much superior position to discover the fraud than were Hare and North. If those lawyers were adequate, then Hare and North have to be adequate, too. Also, Defendants did not object in 1999 to those other lawyers being inadequate for their failure to discover the fraud about the unlimited insurance, so Defendants waived that issue by not raising it then when they had all the information they have now about the Plaintiff lawyers' failure to discover the fraud in 1999. That is, the Defendants, of course, knew at that time that they had no disclosed the unlimited insurance.

(2) At Defendants' May 15th brief, pp. 48-50, Defendants argue that the payment to John Lauriello in 1999 to compensate his losses violated RPC 5.4(a) as a fee split with a non-lawyer. The applicable Rule, 5.4(a), just prohibits splitting a fee. It does not address or prohibit a reduction in fee to net the client a higher portion of his actual loss. This is commonly done and is an accepted practice. Defendants cite no authority for the proposition that a fee reduction belonged to the class and should have been returned to the class. The Court approved the total attorneys' fee, and how that total fee was divided among lawyers was no one else's concern.

At the time, in autumn 1999, John Lauriello was an individual client represented by Hare and North on an individual basis. Lauriello was never a class representative, and Hare and North were never settlement class counsel. The total fee was approved, and no one objected or appealed. Nothing Hare and North did harmed the class or increased its fees in any way. This was not an advance payment to Mr. Lauriello to somehow "buy" him as a plaintiff. There was no *a priori* agreement with Mr. Lauriello. This was not extra compensation to a named plaintiff class representative. This was not an incentive award to a named plaintiff class representative. Courts approve incentive awards to named class representatives, in large part because the incentive award is typically paid by the class, like litigation expenses. So, the payment reduces the net recovery to the class. The voluntary fee adjustment made by Hare and North did not reduce the class's net distribution in any way. Even if technically incorrect, the payment to Lauriello does not reflect adversely on counsel's abilities or concerns for their client's well-being and fair treatment. Hare and North's client got what he hired them to recover.

The Hearing Transcript, at pp. 362-65, reports some of Dean Kenneth Randall's expert opinions on this issue (emphases added):

A. Well, subsequent to the settlement, Hare Wynn reduced their fee and gave approximately $76,000, in that range, between 70 and 80, to the plaintiff Mr. Lauriello. It's been submitted by defense counsel that that violates 1.5 as well as 5.4 dealing with sharing of fee with a non-lawyer. I see nothing whatsoever in 1.5 that would prohibit a firm from reducing their fee.

Q. That happens all the time doesn't it?

A. Well, it does happen frequently. And it did not hurt the class. The class total was not affected. Mr. Lauriello was the client of Hare Wynn. And what's, I think, most important is he was given the exact amount of his loss in the MedPartners stock. He wasn't given an excessive amount. They contacted his stockbroker . . . and said, what exactly was his loss, and they gave him his loss. I don't see any quid pro quo. I don't see any solicitation. I don't see anything wrong with it.

We talk about this rule in my class. We have a lot of material about excessive fees, and not a whole lot of material about the ability of a lawyer to reduce his fees. We do know that under Rules of Alabama Conduct, you're allowed to have pro bono cases. This is not a pro bono case, but you're allowed to reduce your fee. I don't see any prohibition at all under 1.5.

I think the idea is that this is sharing a fee with a non-lawyer. When you look at that provision of the code, it has to do with the independence of counsel that a non-lawyer is not being paid a fee in a way that gets him involved in the decision-making aspects of the case. That would constitute as an authorized practice of law. The fee was given or the reduction of the fee was given after the fact, after the case. I mean, I think the 5.4 argument, frankly, is a nonstarter.

Q. In other words, is what you are saying is that Mr. Lauriello was provided funds that were identical to the market losses of the stock that he had that were not compensated for in the settlement?

A. Yes, sir.

Q. And so -- and that was done after the fact, I mean, after the court approval and after the case was decided?

A. Yes, sir. And at that time, plaintiff's counsel were not class counsel. The case had been dismissed at that point. Again, the total amount of the settlement was not impacted.

Q. Did the payment to Mr. Lauriello to compensate for his market losses have any adverse impact on the class whatsoever?

A. No, sir.

Q. Is it your understanding at the time that was made that Mr. Lauriello was not a class representative where payments to him would be approved by the Court, but was just an individual client of the Hare and North firms?

A. Yes, sir, whose claims had been dismissed by the Court.

Q. Is that significant in any respect to your conclusions?

A. Yes, sir. I don't see any ethical problem whatsoever, professionalism problem whatsoever with the acceptance of the fee originally from the class settlement and then the reduction of the fee and then going forwards with Mr.

Lauriello.

(3) Defendants' May 15th brief, at pp. 50-53, complains about the fee split that Hare and North received from Milberg Weiss. They say the governing law is RPC 1.5(e). As already stated, in a contingency fee case, all that is required is client consent (which John Lauriello gave). See Plaintiffs' brief at pp. 131-32. Dean Randall testified that: "Under 1.5(e) of these Rules of Professional Conduct, firms are allowed to come together and make a decision about the sharing of a fee in a case. Really, what's required is that the client here, Mr. Lauriello, consented." Hearing Transcript, p. 353. Alabama's version of the RPC does not require the split to be based on the amount of work done or on the duty of joint representation. *Id.*

The total class fee was approved by Judge Wynn as fair. How that total fee is then divided among plaintiff lawyers is no one else's business. The fee split did not increase the class's fees and did not harm the class. And, it did not violate the RPC.

Defendants further argue that the fee split was unethical because there is no evidence that Blankenship, Milberg's individual client in an individual case, consented. Blankenship was Milberg's client. Defendants cite no law that indicates that Hare and North could be charged if Milberg did not get consent from its client. Hare and North had no contact with Blankenship, and it would have been unethical to try to contact him because he was known to be represented by other counsel. Dean Randall opined that the duty of consent was between Milberg and Blankenship. Hearing Transcript p. 356.

During the testimony of Tim Francis, Blankenship's contract with Milberg was read into the record. The written agreement specifically authorized Milberg to associate other lawyers into

the case. Hearing Transcript pp. 841-42. The contract disclosed to Blankenship that Milberg was involved in other pending *MedPartners* cases, including class actions, and *Lauriello I* was specifically mentioned by name. *Id*. at p. 842. Blankenship specifically waived any conflicts of interest these other *MedPartners* cases might create. *Id*. at pp. 842-43. So, for what it might be worth, the record does disclose that Milberg exhausted its duty to get consent from its client, Blankenship. This third charge is frivolous.

The Court may also find it relevant to note that the *Blankenship* money directed to Hare and North in 1999 does not have to be exclusively analyzed as a splitting of a fee within the context of the RPC. The Court heard testimony about how the Milberg firm breached its contract with Hare and North by not notifying Hare and North and getting them jointly into the *Blankenship* case. The $800,000 represents exactly what the damages were for that breach of contract. So, for the breach of contract, the Milberg firm owed that amount in damages, anyway, which scenario does not even trigger an application of the RPC. *Poole v. Prince*, 61 So.3d 258 (Ala. 2010), involved a similar joint prosecution agreement between lawyers to split fees gained by either in a combination of related suits. The Supreme Court reversed summary judgment and remanded for trial on breach of contract. The Court specifically held that RPC 1.5 was irrelevant[9] to the case and that it ought to be treated as a breach of contract action.

(4) Defendants' May 15th brief, at pp. 53-54, without citing any authority, asserts that Hare and North should have made a fee petition to Judge Wynn and accounted for their hours

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[9] One law firm argued that the other did not perform work, that the relevant client withdrew consent, etc.

and work. There simply was no such duty, and there exists no legal authority even hinting at any such duty. Defendants (p. 53) merely reference Judge Wynn's order of May 10, 1999. But, Hare and North were not settlement class counsel, and they were not served with that order. Hearing Transcript p. 689 (Haley). This fourth charge is also frivolous.

The Court (Judge Wynn) approved a total fee as fair. In common fund money cases, this is usually a contingency percentage, and not tied to an hourly rate. "[T]he common-fund approach remains the preferred method for calculating attorney fees in class actions in Alabama." *Union Fid. Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 195 (Ala. 2000) "'[A]ttorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.' *Camden I*, 946 F.2d at 774." *Faught v. Am. Home Shield Corp*., 661 F.3d 1040, 1049 (11th Cir. 2011). How Milberg divided up its court-approved contingency fee is not a matter for court approval. Moreover, Judge Wynn's July 10, 1999, order specifically ordered and authorized court-appointed settlement class counsel to allocate their portion of the award to their co-counsel or referring counsel.

(5) Defendants' May 15th brief, pp. 54-56, without citing any relevant authority, argues that the $2M fee split to Hare and North was excessive. Defendants cite only RPC 1.5(a), which prohibits excessive fees. But this is completely out of context. Rule 1.5(a) does not purport to govern fee splits and referral fees, which are governed by other rules. The total fee paid by the 1999 class was not excessive, and it was approved by Judge Wynn as fair. How a fair contingency fee is divided among lawyers is not a concern of the Courts or the Bar. This charge is also frivolous.

Alabama's version of the Rules of Professional Conduct, as stated above, does not require a split of contingency fee money to be fair or to be based on work actually done or the duty of joint representation. All that is required is client consent.

(6) Defendants' May 15th brief, pp. 59-65, contends there are ethical duties and violations relating to Hare and Somerville's representation of J. Johnston against MedPartners. Defendants' brief (and their oral presentation) uses a lot of space on this charge, but Plaintiffs' counsel believe it may the easiest of the nine to dismiss. At p. 63, Defendants cite the general rule of confidentiality, RPC 1.6. That's the general duty a lawyer owes to his client. The easy answer to all this is that, of course, MedPartners was never a client of Hare's or Somerville's.

Defendants cite no authority for the proposition that Hare and Somerville owe any duty of any sort to MedPartners, much less a duty of attorney-client confidentiality. Defendants' position is absurd. Defendants cite only the opinion of expert Morgan. Morgan cites no authority except the text of RPC 1.9(b). See Hearing Transcript at pp. 874-76.

Rule 1.9(b) is utterly inapplicable, because it governs a lawyers duty to a FORMER CLIENT. It says (emphases added): "A lawyer who has *formerly* represented a *client* in a matter shall not thereafter: . . . (b) Use information relating to the representation to the disadvantage of *the former client*." See Plaintiffs' brief at pp. 138-141. See also *Ex parte Tiffin*, 879 So.2d 1160, 1165 (Ala. 2003) (emphases added):

> A former client seeking disqualification for the conflict addressed in Rule 1.9 must demonstrate (1) that it "had an attorney-client relationship with the attorney the former client seeks to disqualify and [(2)] that the attorney represented the former client in a [(3)] substantially related matter."
>
> Ordinarily, therefore, "a stranger to the attorney-client relationship lacks standing to assert a conflict of interest in that relationship. "

Dean Randall opined that: "Alabama Rules of Professional Conduct covers conflict with a former client under Rule 1.9. I don't see any conflict here whatsoever. Mr. Somerville and Mr. Haley have always been adverse to MedPartners, Caremark. Their former client was not MedPartners. Their former client was . . . Johnston. I don't understand really the former client position." Hearing Transcript p. 368.

Defendants have also waived the allegations of disqualifications based on Hare and Somerville's representation of Johnston. This is so, because, after the *Johnston* representation, Hare and Somerville sued MedPartners on behalf of similarly-situated officers, Thrasher and Berry. In those cases, Defendants never objected to Hare and Somerville representing MedPartners' opponent (Hearing Transcript p. 383, 495-96) - so the issue is waived. The *Thrasher* and *Berry* situations were substantially similar to *Johnston's* case, so, if there were any valid arguments about confidentiality and disqualification, those issues would have been much more related in those cases. This fraud-in-the-settlement case, on the other hand, is much more removed because Johnston had nothing to do with the fraud and has no relevant knowledge of the facts regarding the fraud.[10] Justice Cook explained that the *Thrasher* case was virtually identical to the issues litigated in *Johnston*. Hearing Transcript pp. 375, 490-94.

And, moreover, there is no evidence whatsoever that Johnston told his lawyers anything relevant to this fraud-in-the-settlement claim, which Johnston did not participate in and knew

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[10] And, really, what could possibly be confidential in 2012 about events in 1998-99 involving a publicly-traded corporation that has now morphed twice into Caremark and now CVS? We know all the relevant facts. We have transcripts of sworn testimony where Defendants' own lawyers admitted to the fraudulent scheme to hide the existence of the LMU from everybody, including Plaintiffs' 1999 class counsel.

nothing about.[11] Johnston left MedPartners in early summer 1998, several months before the LMU was negotiated and purchased in autumn 1998. Ralph Cook explained that MedPartners did not sue Johnston in his capacity as a lawyer, but as a corporate officer. Hearing Transcript pp. 512-14. Justice Cook further explained that issues of privileges and confidentiality never came up and were never a part of the *Johnston* litigation. Hearing Transcript pp. 485, 556. Johnston had no MedPartners documents; to defend him, Hare and Somerville got documents from MedPartners through discovery and got public documents from the SEC. Hearing Transcript p. 483. The Court heard the testimony about how wide-ranging testimony and evidence was presented in the two *Johnston* trials, all without any claims of privilege or confidentiality on MedPartners' part - - - thus waiving whatever privileges might have existed vis-a-vis J. Johnston.

Defendants have shown no actual prejudice from the *Johnston* representation. See, similarly, *Broin v. Phillip Morris Companies, Inc.*, Nos. 3D11–2129, 3D11–2141, --- So.3d ----, 2012 WL 934034, *4-5 (Fla. App. 3rd Dist. March 21, 2012) (emphasis added):

> The need to balance the traditional rules of loyalty to a client, duties to the court, and duties to the class as a whole, calls for adaptation of the traditional conflict model. . . . The mere appearance or possibility of conflict is not enough in this context, because class actions present unique considerations, particularly once the issue involves counsel's role in approval or administration of a settlement under the court's auspices. . . .
>
> Respondents would have us impute an attorney-client relationship from the attorneys' limited involvement in the litigation of the original action. Such an

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[11] There is also no proof that Johnston disclosed any confidential information relevant to the legal damages caused by the underlying accounting fraud in the late 1990s. And, it is not as if Plaintiffs need any help in that regard, e.g., because we already have sworn testimony from Defendants' own officers, directors, experts, and lawyers that the accounting fraud was the worst case imaginable and was indefensible and caused over $3B of damages to the corporation (and shareholders).

> imputation would necessarily be warranted in all class actions where, although one attorney or a team of attorneys generally head the litigation for the class, others may from time to time collaborate or monitor the proceedings on behalf of individual clients. As the *Lazy Oil* court concluded, the threat of disqualifying their opponent's counsel would give a minority great leverage in any dispute which may arise among class members. . . .
>
> Accordingly, we conclude that, before disqualifying a class member's attorney on the motion of another class member, the court should balance the ***actual prejudice to the objector*** with his or her opponent's interest in continued representation by experienced counsel.

(7) Defendants' May 15th brief, pp. 65-66, attacks the fact that John Lauriello was named as a defendant by the Intervenors. Defendants' brief spends two paragraphs on this issue, and it is not worth that much. This is ancient history. It is moot.[12] John Lauriello is not a defendant today, so there is no potential conflict today, or going forward. This Rule 1.7 argument has no merit.

Defendants cite RPC 1.7(a). That rule is written in the present tense. It says, "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client." That situation does not exist today.[13] And, we all now know in hindsight that the claim

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[12] An analogous mootness decision was made in *United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recovery Associates - Charco Redondo Butane*, 755 F. Supp. 1195, 1204 (S.D. N.Y. 1989): "Hodgson moves to disqualify LeBoeuf as counsel for UBK on the grounds that (1) LeBoeuf's participation in the events giving rise to this action require that it be called as a witness and (2) LeBoeuf's appearance as counsel to UBK and as pro se counsel in defense of Hodgson's third-party claim creates a conflict of interest. Hodgson's motion is moot in light of the resolution of Hodgson's summary judgment motion. Once summary judgment was granted in favor of Hodgson, it disposed of all issues between Hodgson and the other parties."

[13] "As this Court stated in *Underwood v. Alabama State Board of Education*, 39 So.3d 120, 129 (Ala. 2009), '[a] case is moot when there is no real controversy and it seeks to determine an abstract question which does not rest on existing facts or rights' (quoting *State ex rel. Eagerton v. Corwin*, 359 So.2d 767, 769 (Ala. 1977)." *Davis v. Alabama Educ. Ass'n*, No. 1091745, 2012 WL 975492 (Ala. Mar. 23, 2012).

against Lauriello never had any merit, which Mr. Vines now admits.

Defendants' position would be bad public policy, too. Almost any future class action could be derailed by the defendants finding someone to file a complaint in intervention and naming as a defendant the named plaintiff, putative class representative - - - and class counsel could be argued to be conflicted out of the case. The flippant response that the class representative, now sued in intervention, can simply go hire himself an independent lawyer is not a persuasive answer. The putative plaintiff class representative is almost always being represented for free under a contingency contract. In consumer class actions, most of them would have no funds for hiring an hourly-rate defense lawyer. And, even if the plaintiff had money, most would surely drop out of the litigation before spending money out of pocket to defend a frivolous claim. This chilling effect on class actions would be contrary to the public policy undergirding the purposes for having class action procedures.

The question relevant to Rule 23(b)(4) class action adequacy is not whether a lawyer entered an appearance for a putative class representative named as a defendant by an adverse, competing intervenor. The question is whether that representation was "adverse" to the putative class being represented by that lawyer. In this case, there is no inkling of any real-world harm to the class or any adversariness between John Lauriello and the putative class on whose behalf he filed suit in October 2003. As argued and testified to at the hearing, having John Lauriello as a named defendant in the intervenor's complaint was contrary to the class's best interests (as now admitted to by Mr. Vines, now that he has full knowledge of the 1988-99 facts). Plaintiffs' counsel (Hare/North/Somerville) were representing the best interests of the class in seeking the dismissal of Lauriello as a defendant to the intervenor's complaint. We urge this Court to make a

finding of fact that the Hare/North/Somerville representation of John Lauriello, in his capacity as a named defendant in the intervenor's complaint, was affirmatively a positive position that favored the best interests of the class, and, conversely, was in no way adverse to or in conflict with the class's legal or economic or strategic interests.

Similar public policy concerns are expressed in *Sharp v. Next Entm't, Inc.*, 163 Cal. App. 4th 410, 433-35, 78 Cal. Rptr. 3d 37, 55-57 (2008) (emphases added):

> In the realm of class actions, the rules of disqualification cannot be applied so as to defeat the purpose of the class proceedings. (Cf. *Lazy Oil Co. v. Witco Corp*. (3rd Cir.1999) 166 F.3d 581, 589-90 [traditional rules of professional conduct cannot be applied mechanically in the realm of class actions].) Rather, the circumstances of each case must be evaluated.
>
> The motion to disqualify here is not brought by one of the parties who may suffer because of a purported conflict, but by opposition parties who are not directly touched by the purported conflict. Disqualification of the Rothner firm may impose a significant hardship on plaintiffs, who will bear the burden of finding replacement counsel with the skills and knowledge of the Rothner firm, a firm that already has expended more than 1,000 hours on the case, including the review of more than 8,000 pages of documents over seven months. (Cf. *McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, 849-50, 117 Cal.Rptr.2d 489.) As such, we must be skeptical of the impetus and purpose of defendants' motion to disqualify the Rothner firm because it poses the very threat to the integrity of the judicial process that it purports to prevent. Such motions "can be used to harass opposing counsel, to delay the litigation, to intimidate an adversary into accepting settlement on otherwise unacceptable terms, or for other strategic purposes." (*Ibid.*; accord, *Zador Corp. v. Kwan*, *supra*, 31 Cal.App.4th 1285, 37 Cal.Rptr.2d 754. . . .
>
> Lastly, we cannot ignore the public interest consequences of permitting the disqualification of the Rothner firm at this point in the litigation. . . .
>
> The California Rules of Professional Responsibility cannot be construed so as to prohibit this type of advocacy. Further, they cannot be construed so as to hurt class members, under the guise of protecting them.
>
> We cannot assume that the Rothner firm will fail to abide by its ethical obligations and there is no evidence that it will subvert the interests of one of its clients, plaintiffs and members of the putative class, for those of its other client.

"Moreover, the conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules." Bruce A. Green,

Conflicts of Interest in Litigation: The Judicial Role, 65 Fordham L. Rev. 71, 127 (1996).

(8) Defendants' May 15th brief, pp. 66-69, complains about the "Lead Counsel Agreement" between Hare/North/Somerville and intervenors' attorney, Lanny Vines. This agreement does not harm the class. It does just the opposite - by getting this litigation back on track and moving it forward again.

The intervenor, Ms. Hoffman, and her attorney are not restricted in their activities in any way. There is no fee-splitting, either. Mr. Vines will have to apply to the Court and prove his fee claim and the Court will decide. This agreement in no way will increase the total fee to be paid by the class, so there is no potential for harming the class. The only interest the class has is the amount of the overall fee.

Page 68 of Defendants' brief is dead wrong to allege that the agreement is an attempt to bury all issues about the Plaintiff lawyers' past conduct. There has been no hiding from these ethical issues. These briefs and this hearing show that the Defendants are doing just fine in that regard without any help from Mr. Vines. So, again, there is no harm to the class, because all these misconduct allegations are being thoroughly aired.

(9) Defendants' May 15th brief, pp. 69-72, argues that the Plaintiff lawyers will be material and necessary witnesses at trial.[14] We anticipated this argument and briefed it at our

[14] The merits trial can be the only issue. Dean Randall explained that "the lawyer witness rule is not applicable to the pretrial phase of litigation." Hearing Transcript p. 388. So, it does not matter that lawyers testified at the class certification hearing. The only issue is whether the lawyers will be necessary, material witnesses to disputed facts at the merits trial in front of the jury.

May 4th brief at pp. 134-38. The operative rule is RPC 3.7:

> Lawyer as Witness
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) 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 or Rule 1.9.

First, Plaintiffs urge the Court to declare that, even after a rigorous analysis of Defendants' arguments on this point, the record is not finalized enough to issue a final ruling on the "merits" of this lawyer-as-witness issue at this stage of the litigation. It is premature to decide, finally and on the ultimate merits, whether a lawyer will be a necessary, material witness at a future merits trial. That issue can only be properly decided at the trial itself, or at a final pre-trial hearing when witness and exhibit lists have been finalized and the ultimate disputed trial issues identified. Dean Randall relied upon an Alabama State Bar General Counsel opinion in opining that "disqualifying a lawyer [under 3.7] is untimely if it occurs during the pretrial process." Hearing Transcript p. 387. "The idea is that it is premature to determine whether he or she is likely to be a necessary witness until you get into trial." *Id*. at 388. For example, by the time the merits trial arrives, the statute of limitations issues may have been decided as a matter of law during summary judgment procedures.

Second, the Plaintiff lawyers (the Hare/North/Somerville lawyers) are not "necessary witnesses." For example, Hare and North were not settlement class counsel and played no role in the negotiations. It cannot possibly be relevant to the merits trial whether John Haley or Jim North read "A" or saw "B." We now know that court-appointed settlement class counsel saw the

press releases and reports that the Defendants use in their defense. Those lawyers were the real players in the 1999 settlement and it is their testimony (and only theirs, not Haley's or North's) that is relevant. In opening, David Hymer stated: "Class counsel from the underlying [1999] cases has acknowledged in depositions that they were aware of these disclosures prior to the time that the settlement in this case was approved [in July 1999]." Hearing Transcript p. 203.[15]

Third, what they might say is no longer contested. We all know now what lawyers like John Haley and John Somerville did or did not do. The legal implications of the facts are disputed and we are arguing the law before the Court now (not in front of the jury at a later merits trial). There are no significant facts in dispute that the lawyers could conceivably be asked about. Just to make up an example, John Haley either read MedPartners' 1999 10-K prior to Judge Wynn's hearings, or he didn't. That kind or fact is established and is not contested.

Fourth, most or all of what the Defendants say the Plaintiff lawyers need to testify about would fall within the definition of relating to the nature of their legal services rendered in this case. This is permitted by Rule 3.7(a)(2) ("the testimony relates to the nature and value of legal services rendered in the case"). Dean Randall agrees that (a)(2) applies to this case. Hearing Transcript pp. 385-86.

Fifth, disqualification would work a substantive hardship to the class because no one knows this case any better or has a stronger incentive to work on behalf of the class.

And, sixth, disqualification of an individual lawyer-witness does not disqualify the entire

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[15] At p. 210, Mr. Hymer quotes John Haley's comment from a hearing [probably in 2004], saying, "Of course we knew there was excess coverage. Everybody knew that because they had these press releases." In context, all Mr. Haley was saying is that we now know these press releases and SEC filings existed, and we know that 1999 settlement class counsel saw them or had access to them. This does not make Mr. Haley a necessary witness: the fact is not disputed.

firm. For example, Scott Powell can try this case, even if John Haley cannot. Rule 3.7(b) cross-references Rules 1.7 and 19. Rule 1.9 does not apply because Medpartners is not a former client of Hare's or North's. And, as argued earlier, Rule 1.7 does not apply because there is no "material limitation" on the Hare or North firm's ability to represent the class at a trial based on these allegations or misconduct, because these ethical issues are litigated pre-trial before the Court and not at a jury trial on the merits.

None of these nine ethical charges hold water. And, even viewed in the best possible light for the Defendants, none of these charges rises to the level of disqualification or proves that counsel are unqualified and inadequate to represent this class. The only real issue in this certification process is the question of individual reliance. These lawyer-misconduct issues are meritless.

VII. THIS UNIQUE CASE SUPPORTS A UNIQUE APPLICATION OF RULE 23(b)(1) FOR A "MANDATORY" CLASS ACTION

Plaintiffs seek certification under both Rule 23(b)(1) (a "mandatory" class) and Rule 23(b)(3) (an "opt-out" class).[16] A class "can be certified under more than one section of Rule 23(b)." David F. Herr, Annotated Manual for Complex Litigation § 21.2 (2012 ed.) (database updated May 2012). In candor to Court, undersigned Plaintiffs' counsel again point out that this is not a deal-breaker type of issue. We are capable and ready to proceed with this case under (b)(3). The only significant distinction is another notice to the class and another opt out period.

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[16] The subtitle on p. 107 of Plaintiffs' May 4, 2012, brief is in error to reference "Rule 23(b)(1)(A)." A reading of that subsection (pp. 107-12) and the conclusion (pp. 154-56) makes it clear that Plaintiffs are relying on all of Rule 23(b)(1), not just (b)(1)(A).

We also recognize that a (b)(1) certification in this case would be a departure from the ordinary use of (b)(1) and the general principles usually discussed with regard to (b)(1). But, we continue to urge the Court's careful consideration of (b)(1) because the facts of this case are literally unique: a case alleging a fraud committed on a class, as a separate legal entity.[17]

Because this case is unique, we ask the Court to seriously consider certifying the class under both (b)(1) and (b)(3). That will give the Supreme Court the opportunity to address (b)(1) and decide whether the unique facts of this case support a unique application of (b)(1). And, if not, no harm done. The Supreme Court can simply reverse the (b)(1) certification and affirm the certification solely under (b)(3). This is one example of how the law evolves to address new situations; otherwise, nothing would ever change and new cases presenting issues of first impression would go unaddressed and wrongs unresolved.

Our basis for the application of (b)(1) to these facts rests solely on our arguments for this Court's application of the principle that a certified class is a new, independent, single legal entity, separate from the individual class members. If the victim of this fraud was the class, and the class is its own separate legal entity, then how can the legal system tolerate a multitude of individual lawsuits which all seek to vindicate the rights of the same single legal entity, the class? The single legal entity, the class, should be permitted one shot, and only one shot, at these Defendants for this fraud claim. The class either wins or loses, and the class members win or

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[17] Ala. R. Civ. P. 23(b)(1) provides for the certification of a mandatory class if "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, or (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."

suffer an economic loss, not directly, but only derivatively as a result of their status as a member of that class - just like a corporate shareholder wins or loses a financial gain if the value of his stock goes up or down as a result of the corporation winning or losing a lawsuit. If a corporation has been defrauded, the law does not permit each shareholder to file individual fraud claims. The same principal should apply here. The class members were not individually defrauded, they suffered economic damages solely by virtue of their membership in the class.

There are no fraud-on-the-class-settlement cases, so there are no cases applying (b)(1) to fraud-on-the-class-settlement claims. If the Court agrees with Plaintiffs that the closest and best analogy is to entities like corporations, then the principle that the corporate entity files one lawsuit when it is defrauded (and individual shareholders have no right to individual litigation) should be sufficient authority for the application to (b)(1) to this case. "'It is well settled that when individual damages sought to be recovered by a plaintiff are incidental to his or her status as a stockholder in a corporation, the claim is a derivative one and must be brought on behalf of the corporation.' *Pegram v. Hebding,* 667 So.2d 696, 702 (Ala. 1995)." *Altrust Fin. Services, Inc. v. Adams*, 76 So. 3d 228, 241 (Ala. 2011). If the wrong is directed to the corporation, only the corporation can sue, and the individual shareholder has no "standing" to sue the fraudster. *Id*. Similarly, a trust is a legal entity separate from its beneficiary. When the trust has been injured, beneficiaries cannot file individual suits, but only the trustee can sue, on behalf of the trust. See *Ex parte Callan Associates, Inc.*, No. 1081683, __ So.3d __, 2011 WL 3963007 (Ala. Sept. 9, 2011), and *Ex parte Morgan Asset Management, Inc.*, No. 1100714, __ So.3d __, 2011 WL 3963004 (Ala. Sept. 9, 2011).

Why should an individual class member have the right to opt out and individually litigate

the rights of the class and individually litigate the core question of whether these Defendants committed fraud on the class settlement? In other words, an individual class member lacks "standing" to sue for an injury that was done to a separate legal entity, the class.

Defendants negotiated this settlement with putative class counsel representing a putative class. Judge Wynn certified this class in May 1999, creating a new, single legal entity. The final certification was confirmed before the final act of the tort took place - the entry of the final judgment in July 1999. Thus, Plaintiffs contend that the legal entity that was defrauded was the class, not the individual class members. The class members were economically harmed only derivatively, in their status as class members, just like legal harm to a corporation economically injures a shareholder only derivatively, only because the value of their stock declines.

So, one way of analyzing the legal theory involved in this case is that the "plaintiff" today is a single plaintiff, the class. We have named class representatives only because a class can only act through some appointed human representative or agent, just like a corporation can only act through its officers or agents. If the only entity or party defrauded is the class, then individual litigation seems literally impossible, by definition, by operation of law.

It is true that some negotiations and some relevant facts happened prior to May 1999. But, every lawyer involved and these Defendants understood they were dealing with a putative class and were aiming toward the goal of class certification and class settlement. They all understood the law to be that no class settlement can be consummated without Court approval.[18]

[18] This is a merits issue not presently before the Court, but, because Court approval is the necessary last act to a class settlement, it can be argued that all that matters in this fraud-in-the-class-settlement claim is what the Court (Judge Wynn) was told and provided in May and July 1999. Everything that happened in the preceding months is arguably irrelevant.

So, from the Defendants' perspective, for their scheme to ultimately succeed, the Court had to be tricked into approving a $56M settlement. Thus, the tort was not complete and no injury occurred until July 1999 when final Court approval was given. At that time, a certified class existed, and a certified class is a separate, independent, single legal entity.

So, the ultimate question as to utilization of Rule 23(b)(1) is how will this Court apply the principle that a certified class is a separate legal entity. If the court agrees with us that the real party in interest is the class, and that it was the class that was defrauded, then the application of (b)(1) seems to be a necessary logical conclusion. Any attempt at individual litigation would necessarily require proof and defense of the issue of whether the class was defrauded. Then that determination, one way or the other, could be collateral estoppel to the loser. At very minimum, it would be stare decisis. Decisions on that issue would materially affect the ability of later litigants to have a fair claim to litigate their rights. Rule (b)(1)(B) can be used "where the stare decisis effect of the judgment with respect to the claim of one individual is likely to have a compelling impact on future litigation by persons similarly situated because no real individual issues exist to distinguish the earlier precedent." 6A Federal Procedure, Lawyers Edition § 12:182 (database updated June 2012). Individual litigation claiming fraud on the class that loses would, as a practical matter, impair later litigation which necessarily would be presenting exactly the same claimed evidence and arguments already rejected. That triggers the second leg of (b)(1), (b)(1)(B).

We understand that many federal and state cases hold that (b)(1) usually cannot be used in money damage cases. But, the law does not create an absolute blanket prohibition. Here, again, we argue that the unique nature of our claim creates a unique exception to the general rule

against certifying money damage claims under (b)(1).

Defendants' May 15th brief, at p. 24, cites the United States Supreme Court cases of *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and argues that a (b)(1) certification would violate due process by preventing a new opt out period. We stand by our argument that a certified class moots that issue. The shareholders and class members had an opt out period in 1999. By staying in the class, all their potential individual claims were merged into the class. The class claims either succeed or fail. The class claims are litigated one time by a single entity, the class. We argue that this fraud-in-the-settlement claim is a claim belonging to the class. Individual class members gave up their right to individually litigate class claims when they failed to opt out in 1999.

The Supreme Court, at *Ex parte Caremark RX, Inc.*, 956 So.2d 1117, 1125 (Ala. 2006), stated that: "Despite the existence of the new claims, there can be no dispute that the class of persons similarly situated to Lauriello with regard to these newly asserted claims is identical to the class certified in the MedPartners securities litigation." When the opt out period expired in June 1999, no fraud had yet been consummated. But, every non-opt-out had taken exactly the same position: to give up the right to proceed on an individual basis in exchange for the benefits of the proposed settlement - if approved by the Court. The individual members have not been defrauded at this point, in June 1999, and the proposed class has not yet suffered any damage, because the settlement has not yet been approved. Judge Wynn then holds a final hearing and enters a final approval order[19] based on what he had been told. Then, all members of the class

[19] The 1999 case was settled on the basis of the value of the case as a class action, not based on the value of any individual class member's claim.

suffered identical damage at precisely the same time and place, e.g., because they did not opt out and false information was given to seek approval by Judge Wynn. In this unique situation, the appropriate question maybe one of "standing:" i.e., who has the right to bring an action on behalf of a class that is already certified and then is legally wronged and damaged? The answer should be that the appropriate party is now a class composed of the same members of the first certified class, which is, in practical effect, the same class. No single individual should be allowed to have "standing" because no single individual was defrauded. It was every member of the class who was defrauded.

The claims herein are uniform. The class's lawyer-agents and court-fiduciary were either defrauded or not. The class sinks or swims as a whole. The defenses are also uniform. The press release and SEC filings either adequately disclosed the truth or they did not. It is a single uniform issue. So, we ask the Court to certify under both (b)(1) and (b)(3) because both seem to fit the facts presented in this case of first impression.

Contrary to defense counsel's categorical pronouncement, the decision in *Funliner of Alabama, L.L.C. v. Pickard*, 873 So.2d 198, 207 (Ala. 2003), is not determinative of the use of (b)(1) in this case. First, *Funliner* spoke only to the first leg of (b)(1), (b)(1)(A). We also rely on (b)(1)(B), and there certainly is no prohibition on using (b)(1)(B) in money damage cases. In fact, a type of money damage case, the "limited fund" type of case, is the most common use of (b)(1)(B).[20]

Second, as to (b)(1)(A), *Funliner* just cited a 1987 11th Circuit case and a 1994 United

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[20] See 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 5:8 (8th ed.) (database updated Nov. 2011), and 5 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, Newberg on Class Actions § 17:16 (4th ed.) (database updated June 2012).

States Supreme Court case for the proposition that most federal courts hold that it is usually inappropriate to use (b)(1)(A) in money damage cases. There are, of course exceptions. For example, in *Hash v. United States*, No. 99–324, 2000 WL 1460801 (D. Idaho July 7, 2000), and *Lowers v. United States*, No. 99–90039, 2001 WL 1200869 (S.D. Iowa May 2, 2001), owners of property adjacent to certain abandoned railroads sued exclusively for money damages under a takings theory. Both courts certified classes of property owners under Rule 23(b)(1)(A) because they all lived near the same railroad and the risk of inconsistent judgments in independent suits could cause practical harm. Those facts are very different, but the point is that there is no absolute prohibition on money cases. Some states have interpreted their Rule 23 differently and rejected even the federal presumption against using (b)(1)(A) in money cases. For example *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285, 304-05, 263 P.3d 767, 782-83 (2011), agreed with *Turner v. Bernstein*, 768 A.2d 24, 33–34 (Del. Ch. 2000), and held that (b)(1)(A) can apply to money damages cases because, "holding that a Rule 23(b)(1)(A) class can be certified only for claims for injunctive and declaratory relief . . . renders Rule 23(b)(1) largely redundant of Rule 23(b)(2), which expressly addresses injunctive and declaratory relief." *Id.*, quoting the Delaware Court at 768 A.2d at 34.

VIII. ADDITIONALLY, OR ALTERNATIVELY, THE FRAUD CLAIM IS CERTIFIABLE UNDER RULE 23(b)(3)

Plaintiffs also seek certification under Ala. R. Civ. P. 23(b)(3), which provides (emphasis added):

> . . . the court finds that the questions of law or fact common to the members of the class <u>predominate</u> over any questions affecting only individual members, and that a class action is superior to other available methods for the fair

> and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The key principal, and the only (b)(3) element in dispute, is predominance. There is not much dispute about the other factors. There is very little, if any, "interest of members of the class in individually controlling the" litigation. Most class members are relatively small investors who would not have the interest or economic incentive to pursue individual litigation. There is no other "litigation concerning the controversy already commenced." The Circuit Court of Jefferson County oversaw and approved the 1999 class settlement. Thus, the "desirability . . . of concentrating the litigation of the claims in [this] particular forum" are obvious. And, Plaintiffs have argued in brief (May 4th brief at pp. 153-54) and in oral presentation that a class-wide merits trial of this case would pose no "management" hurdles. The cast of witnesses is rather small, and most all of the material facts are already known and not in dispute. From the settlement process experience in 1999, we know that any settlement or judgment funds can be efficiently managed and distributed, as can the claims process. Also, see our May 4th brief at pp. 68-90, where we examine the elements of an Alabama fraud action and demonstrate how proof can easily be made in a class trial.

Defendants' May 15th brief addresses (b)(3) certification at pp. 27-38. Defendants raise only two objections to this Court's finding that the factors of (b)(3) exist. Those two objections are: Individual Reliance (pp. 27-35); and Conflict of Laws (pp. 35-38).

Conflict of Laws. Defendants contend that common questions do not predominate

because, they say, the fraud laws of each state must apply to this case. Plaintiffs contend that Alabama law applies to the whole case, the entire class, and each class member, and they address this Conflict of Laws issue separately in section IX, *infra*.

Individual Reliance. Defendants also dispute (b)(3) preponderance on the ground that each class member must prove his/her/its own individual reliance. Plaintiffs reply separately to this core issue, Individual Reliance, in section X, *infra*.

Affirmative Defenses. There has been some argument from the defense side about how the existence of affirmative defenses (e.g., statute of limitations) might affect predominance of the common questions or interfere with the efficient management of this case on a class-wide basis. Plaintiffs briefed the issue of affirmative defenses at pp. 148-53 of their May 4, 2012, brief. It is very rare for a court to determine that the existence of alleged affirmative defenses prevents certification. *Id.*

Defendants, for example, have argued that each class member may have had individual knowledge of the alleged disclosures (press releases, etc.) and that the reliance of their agents and fiduciary cannot be imputed to them if they had individual knowledge. As argued below, in section X, individual knowledge does not prevent a fraud action in entity situations. Yet, granting the relevance of such individual knowledge, what this means is that the Defendants propose an affirmative defense.

Courts are hesitant to allow affirmative defenses to defeat class certification. The general rule, regularly repeated by courts in many circuits, is that, "Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39

(1st Cir. 2003) (continuing, "Instead, where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses."). See also *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 233 (2d Cir. 2008) ("[T]he presence of individual defenses does not by its terms preclude class certification."); *In re Linerboard Antitrust Litigation*, 305 F.3d 145, 162 (3d Cir. 2002) (noting, in discussing affirmative defenses, that "most courts have refused to deny class certification simply because there will be some individual questions raised during the proceedings," and agreeing with the statement that "we reject any per se rule that treats the presence of such issues as an automatic disqualifier"); *In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 138 (2d Cir. 2001) ("Although a court must examine the relevant facts and both the claims and defenses in determining whether a putative class meets the requirements of Rule 23(b)(3), the fact that a defense 'may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones'") (citation omitted).

This is particularly true given the range of procedural mechanisms available to courts to deal with potentially individualized affirmative defenses. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 141 (2d Cir. 2001) ("There are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.")

Similarly, under Alabama law, an affirmative defense does not automatically defeat class certification. In several cases, the Alabama Supreme Court has vacated class certification orders for failure to "conduct a rigorous analysis" that "properly consider[s] the defenses of the defendants." *Mayflower Nat. Life Ins. Co. v. Thomas*, 894 So. 2d 637, 642 (Ala. 2004); see also *General Motors Acceptance Corp. v. Massey,* 893 So. 2d 314, 320 (Ala. 2004) (vacating a class certification order because it did not address compulsory counterclaims and defenses). These decisions necessarily imply that an affirmative defense may be relevant to predominance, but does not defeat it as a matter of course; otherwise, the Supreme Court would not have instructed the district courts to "consider" the impact of defenses on remand – it simply would have held that the presence of an affirmative defense defeated predominance. And, indeed, the Alabama Supreme Court has affirmed a lower court's certification of a class over the argument that presence of affirmative defenses rendered individualized issues predominant, holding that waiver, mitigation of damages, and voluntary payment defenses are all affirmative defenses that can be applied "across the board to each class member." *CIT Communication Finance Corp. v. McFadden, Lyon & Rouse, L.L.C.*, 37 So.3d 114, 128 (Ala. 2009).

A recent Alabama Supreme Court case did hold that an affirmative defense contributed to a finding that common issues did not predominate in a class certification decision. See *Nat'l Sec. Fire & Cas. Co. v. DeWitt*, No. 1091225, 2011 WL 5607802, *27 (Ala. Nov. 18, 2011). But, that case is distinguishable in that other issues contributed more significantly and likely controlled the outcome. The action was against insurers for breach of contract concerning payments in the wake of Hurricane Katrina. Because each individual plaintiff experienced different damage from the storm, the court expressed concern about the individualized factual inquiries involved in

determining liability to each plaintiff. Affirmative defenses were a secondary consideration and one particularized to the contract setting.

Although in *U-Haul Co. of Ala., Inc. v. Johnson*, 893 So. 2d 307 (Ala. 2004), the Supreme Court vacated the class certification order and remanded for consideration of how the affirmative defense affects predominance, Justice Johnstone's concurrence in that case helpfully summarized the bearing of affirmative defenses on certification. First, Justice Johnstone stated that affirmative defenses do not automatically render a case individualized; rather the affirmative defense must be one that requires individualized inquiry. *Id*. at 313-14 (Johnstone, J., concurring). Second, Justice Johnstone identified the procedure for determining whether affirmative defenses are individualized:

> Because the defendants bear the burden of proof of an affirmative defense, unless, in the class-certification proceedings on remand, the defendants produce substantial evidence that a substantial number of putative class members overpaid the taxes with full knowledge of all the facts, the trial court can and should, in my opinion, reject the defendants' contention that this affirmative defense forecloses class certification.

Id. at 314 (Johnstone, J., concurring) (internal quotation omitted).

At p. 33 of Defendants' May 15th brief, they write: "If an individual member of the putative class had full knowledge of one or more of the five separate disclosures about the excess insurance, interpreted those discloses to mean that the available insurance was more than sufficient to cover any settlement or judgment, and felt that the $56 million settlement was fair regardless of the amount of insurance available, those facts would be relevant to the <u>defense</u> of that individual putative class member's case." (emphasis added). [Defendants themselves call this a "defense."] As applied here, using Justice Johnstone's analysis, the Defendants' affirmative defense is:

> [1] If an individual member of the putative class had full knowledge of one or more of the five separate disclosures about the excess insurance, [2] interpreted those disclosures to mean that the available insurance was more than sufficient to cover any settlement or judgment, and [3] felt that the $56 million settlement was fair regardless of the amount of insurance available, those facts would be relevant to the defense of that individual putative class member's case.

Thus, according to Justice Johnstone's procedural analysis, for this affirmative defense to defeat certification, the Defendants would have to show "substantial evidence that a substantial number of putative class members" met the three prongs of their purposed affirmative defense.[21] Although they have deposed and quoted from the plaintiffs' testimony (May 15th brief at p. 31), not a single plaintiff says any one of these three prongs. Indeed, it is fair to conclude that the Defendants could not possibly show by substantial evidence that a *substantial number* of class members met the three prongs of their alleged affirmative defense. In fact, Defendants have not identified even one such hypothetical class member. Justice Johnstone says for individual affirmative defenses to prevent certification, Defendants have to show that a substantial number of class members are subject to this defense. Here, these defendants have not identified even one, much less a substantial number.

Third, and finally, Judge Johnstone reiterated the general approach most courts throughout the country take to affirmative defenses at certification:

> Courts should be skeptical of a putative class-defendant's claim that an affirmative defense would require individualized inquiries that foreclose class certification. . . . Indeed, respectable authority holds that "an inquiry into a claimed affirmative defense impermissibly allows an issue going to the merits of the litigation to intrude upon the class certification analysis required by Rule 23.

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[21] "However, the defense must be one that the preliminary facts show is not merely theoretical. . . ." Gregory C. Cook, The Alabama Class Action: Does It Exist Any Longer? And Does It Matter, 66 Ala. Law. 289, 294 (July 2005).

> [citing 10 cases] That other respectable authority holds to the contrary [citing one case] does not diminish the potential for the misuse of illusory or only fractionally applicable affirmative defenses to thwart the certification of legitimate classes."

Id. (internal quotation and citations omitted). Justice Johnstone's decision helpfully demonstrates that:

> • an affirmative defense does not automatically defeat class certification on predominance grounds;
> • that the burden of proof on the defenses lies with the defendant;
> • that the burden is discharged only with the production of "substantial evidence that a substantial number of putative class members" engaged in the activity that would defeat their claim; and
> • that a court should be "skeptical" of over-emphasizing affirmative defenses.

The general rule is that issues involving affirmative defenses are merits issues and do not predominate over the common question and do not prevent certification. There has been no showing as to why the general rule is not fully applicable in the case at bar.

Plaintiffs have made this point, since motion to dismiss hearings in early 2004: Whatever the merits of the affirmative defenses, they are class-wide defenses. That is, the existence of potential affirmative defenses do not hinder certification. In fact, the potential affirmative defenses are so uniform, vis-a-vis class members, that their existence actually strengthens the case for class certification. For example, defense counsel Chris King told the Court that: "It's our position in this lawsuit that this [the December 17, 1998, MedPartners press release] unambiguously placed <u>everyone</u>, placed <u>the public</u> on notice such that any reliance after this date on any of the facts allegedly misrepresented or suppressed was unreasonable as a matter of law." (emphasis added).[22] Hearing Transcript p. 226.

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[22] Defense counsel then segued into an argument about how this actually makes individual reliance relevant; but, even Defendants have to concede that a decision in their favor

IX. CONFLICT OF LAWS ISSUES DO NOT EXIST AND DO NOT PRESENT A HURDLE TO CERTIFICATION

Pages 35-38 of Defendants' May 15th brief argues there are conflict of laws issues that prevent certification because the substantive fraud law of many or all other states would have to apply. First, Plaintiffs assert this conflict of laws issue is untimely. It is too late to raise this issue. Ala. R. Civ. P. 44.1 requires: "A party who intends to raise an issue concerning the law of another state . . . shall give notice by pleadings or other reasonably written notice." The cases explain that "reasonable" includes the requirements of timeliness.

The default rule is that a forum applies its own law unless a party timely and reasonably raises the issue of foreign law. Here defendants have waited over eight years and this Court could refuse to even consider the issue on that basis alone. The original complaint, on behalf of a nationwide class, pleaded fraud, and that was presumed to mean Alabama fraud law. Defendants filed a motion to dismiss on January 15, 2004. In their supporting brief, they argued only the Alabama law of fraud. As one example, p. 22 of Defendants' brief argued that: "Under Alabama law, a plaintiff must plead the following elements of fraudulent suppression. . . ." Page 24 argues: "Under Alabama law, the duty to speak may arise from . . . ." CVS filed an answer on August 24, 2004. Its affirmative defenses begin at p. 24. All the references to any particular substantive law are purely to the law of Alabama. For example, the 22nd defense, on p. 28, asserts that the punitive damages claims are all subject to the limitations in Ala. Code § 6-11-21. AIG's answer of August 19, 2004, similarly references only Alabama law.

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on their first position would terminate the class action in their favor on the merits - - - which we say helps to show why class certification serves judicial economy. That is, there is an affirmative defense that has the potential for deciding the merits of the entire case for everyone, every class member.

This case has already been certified once. In opposition to that first certification, Defendants argued that the Court failed to follow the Alabama rigorous analysis statute, but Defendants never mentioned conflict of laws as an impediment to certification. We are not trying to avoid a rigorous analysis of every issue. Therefore, we respectively suggest that the Court write in its certification order that it finds this issue to be untimely raised, but, in case that finding is reversed, the Court is giving a rigorous analysis to the merits of Defendants' conflict of laws issue.

Plaintiffs urge this Court to consider, but then reject, the merits of Defendants' argument. First, these Defendants, and this class (all class members), have jointly agreed to the application of Alabama substantive law. The Stipulation of Settlement, dated January 18, 1999, was signed by both AIG and CVS. Also a party to the Stipulation was "each of the Settlement Class Members." (Quoting p. 2 of the Stipulation.) The Stipulation has a choice of law clause that should moot this issue, e.g., by application of waiver and estoppel.

Paragraph 8.14, at p. 50 of the Stipulation, says: "This Stipulation 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 the 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." Defendants are now estopped to argue for the application of anything other than Alabama law. Similarly, any hypothetical objecting class member would also be estopped. The absent class members are now bound to Alabama law - even if other law might otherwise have applied (a result which Plaintiffs herein deny would have existed, even in absence of the agreement).

The Stipulation, of course, does not mention this fraud-in-the-settlement claim by name - - - obviously, because the Defendants were not disclosing the existence of unlimited coverage. However, the Stipulation does purport to govern every material aspect of the 1999 class settlement. And, the parties agreed that Alabama law would apply to all aspects of the Stipulation and settlement. The Stipulation explicitly covers, in great detail, how the parties jointly will move for certification and participate in the necessary court hearings. Paragraph 8.5, at p. 48 of the Stipulation, says: "The parties agree that the amounts of the Settlement Fund [i.e., the $56M] . . . reflect a good faith settlement . . . and defense of the litigation in good faith." This fraud-in-the-settlement claim, in essence, alleges a breach of that duty of good faith. Plaintiffs urge a finding that the agreement, stating that "the rights and obligations of the Parties to the Stipulation shall be construed and enforced in accordance with the laws of the State of Alabama," logically and necessarily encompasses this fraud-in-the-settlement claim.

Consider the case of *Spencer v. Hartford Financial Services Group, Inc.*, 256 F.R.D. 284 (D. Conn. 2009). This is a nationwide class action of persons who had sued Hartford insureds and then entered into structured settlements of those cases with Hartford. It is alleged that Hartford kept a portion of each settlement amount that should have gone into the structure. Plaintiff alleged federal RICO and state law claims for breach of contract, unjust enrichment, and fraud. It is not alleged that Hartford committed fraud-in-a-class-settlement, just fraud-in-the-settlement of thousands of individual cases across the country. One of the questions addressed, beginning at page 299, is what substantive law applies to the fraud claims. At 300, the Court explained that some of the settlement agreements contained a Connecticut choice-of-law clause. That would clearly make Connecticut law applicable to breach of contract claims. But, even as

to the fraud claims, the Court said: "Other contracts provide that Connecticut law will govern; for fraud claims relating to those settlements, there is a stronger argument for applying Connecticut law, because the parties negotiating and settling their agreements expected that Connecticut law would apply. . . ." Here, the parties agreed that Alabama law would govern every aspect of the settlement. Hypothetically, if one could travel back in time and ask, the parties had to expect that Alabama law would also govern any claim involving the settlement, including a claim of fraud-in-the-settlement.

Plaintiffs further contend that Defendants' conflict of laws argument fails on its merits because the fraud alleged herein was committed on a class, not merely on a large group of individual plaintiffs. Plaintiffs' argument here circles back to the core question of whether the case is properly categorized as a fraud-on-a-class type of case. This is the primary issue in the Individual Reliance issue (see section X, *infra*). But this also decides the merits of the conflicts of law issue. If the fraud was committed on the class, then only a single entity, in theory, is the plaintiff. There then would be only one set of substantive law to apply to that one plaintiff. It is clear that Alabama fraud law applies to the class (an Alabama entity created by an Alabama court, operating solely in Alabama), meaning the whole class and each individual class member.

Lastly, even viewed as an individual fraud class action (as Defendants contend), Plaintiffs contend that Alabama law would still apply to each individual class member's hypothetical fraud-in-the-settlement claim. By not opting out, the individual class members waived their individual claims and threw in with the class, merging their individual claims into a single class. That class, its lawyer-agents, and its fiduciary-Court were then defrauded in Alabama.

Neither side has found a case involving fraud on a class in a class settlement. So,

defendants have no authority to cite for the proposition that Alabama law does not apply across the board. The individual fraud cases cited in Defendants' May 15th brief (p. 36) are not on point and are not analogous to or helpful to the choice-of-law determination in this unique class action case.

The cases cited by Defendants do not support Defendants' proposition of a bright-line test for where plaintiff felt economic harm. The law of Alabama (and other jurisdictions, too) is murky on this point and not well-explained or well-established. The literal application of Defendants' choice-of-law rule would lead to absurd results, proving its rule must be faulty. Imagine this example: P has lived in Oregon all his life, and has all his wealth invested in Oregon. P makes his first trip to Alabama and spends a week in Gulf Shores on vacation. P meets D, and D sells P some prime Baldwin County real estate for $300,000 cash. D has lived in Alabama all his life and has several shady business enterprises in LA (Lower Alabama). After returning to Oregon, P finds out his land is in the middle of a swamp. P files suit in Baldwin County Circuit Court and sues D for fraud. Under Defendants' theory of conflict of laws, the Baldwin Circuit Court would be compelled to apply the substantive fraud law of the State of Oregon, because P "felt" the ill economic impact of the fraud on his bank account in Oregon. This would be an absurd result, and probably unconstitutional.[23] Defendants have no case that holds Alabama law would require such a result.

Defendants (p. 36 of the May 15th brief) rely primarily on *Glass v. Southern Wrecker Sales*, 990 F.Supp. 1344 (M.D. Ala. 1998) (concluding that Alabama law applies), but that case

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[23] The state chosen by a state's conflict of laws rule must have some rational connection, some minimum contacts, to the claim. *Hague v. Allstate Insurance Co.*, 449 U.S. 302 (1981).

is not exactly as represented by Defendants' brief. Defendants say (p. 36) that the "misrepresentation occurred in Georgia." This is incorrect. West's headnote 3 correctly notes the "misrepresentations were made in Alabama." The opinion states that "the transaction had been agreed to and misrepresentations had been made in Alabama." 990 F.Supp. at 1348. So, the conclusion to apply Alabama law was not based purely on the fact that the brunt of the economic loss was felt in Alabama, but also on the fact that the misrepresentations and the last event necessary to create the cause of action for fraud occurred in Alabama. At 1347-48, the opinion says (emphases added):

> Alabama applies the rule of lex loci delicti, which means that Alabama courts apply the law of the state where the injury occurred. See *Fitts v. Minnesota Mining & Manufacturing Co.*, 581 So.2d 819, 820 (Ala. 1991). In other words, it is not the site of the alleged tortious act that is relevant, but the site of the injury, or the site of the event that created the right to sue. *Gulf States Steel, Inc. v. Lipton,* 765 F.Supp. 696, 701 n.2 (N.D. Ala.1990), *aff'd*, 934 F.2d 1265 (11th Cir. 1991). . . .
>
> [T]he court must determine where the injury from the alleged misrepresentation occurred. See *Gulf States Steel, Inc. v. Lipton*, 765 F.Supp. 696 (N.D. Ala.1990) (analyzing where injury occurred based on where last act of misrepresentation claim occurred and citing *Brown–Marx[Assoc., Ltd. v. Emigrant Savings Bank*, 703 F.2d 1361 (11th Cir. 1983)].

Alabama follows the First Restatement. Restatement (First) of Conflict of Laws § 377 (1934) declares that: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." In this case, the last event necessary to cause the damage and consummate the cause of action for fraud was Judge Wynn's entry in Alabama of a final approval order in July 1999. Until that act, no fraud accrued and the class could not have maintained any action for fraud (because no damage or injury would yet have occurred).

Glass v. Southern Wrecker does not support Defendants' position. Defendants only other authorities (at p. 36) are two other federal trial court orders that cite to *Glass*. *G. F. Kelly*

Trucking, Inc. v. U.S. Xpress Enterprises, Inc., No. 3:06-cv-351, 2007 WL 3227390, *7, n. 9 (M.D. Ala. Oct. 30, 2007), is irrelevant because the Court says that "the parties do not dispute that Alabama law applies to the tort claims in this case." And, lastly, the Bankruptcy Court order in *In re Trinsic, Inc.*, No. 07–10324, 2008 WL 2115336 (Bankr. S.D. Ala. May 19, 2008), is just as ambivalent as *Glass* in regard to whether it is relying on the place of the last act necessary to complete the tort, or place of "feeling" the injury, or both. At *3, the order reads, as follows (emphases added):

> Alabama continues to apply the traditional rule of lex loci delicti to tort claims like Thermo's. *Colonial Life & Acc. Ins. Co. v. Hartford Fire Ins. Co.*, 358 F.3d 1306, 1308 (11th Cir. 2004). This doctrine focuses on identifying the "site of the injury, or the site of the event that created the right to sue." *Glass v. Southern Wrecker Sales*, 990 F.Supp. 1344, 1347 (M.D. Ala. 1998). . . . The Eleventh Circuit has faced this question and has ruled that "[t]he place of the wrong is the jurisdiction where the harm was suffered or where the last event necessary to make an actor liable for the alleged tort takes place." *Velten v. Regis B. Lippert, Intercat, Inc.*, 985 F.2d 1515, 1521 (11th Cir. 1993). . . . After review of Alabama's rule and application of lex loci delicti, the Court concludes that Louisiana is the place where the economic and financial harm was suffered; it was where the last event necessary to make a party liable for an alleged tort took place. Therefore, Louisiana is the place of the alleged injury or wrong and pursuant to Alabama's choice of law provision, Louisiana substantive law should be applied to this case.

Again, in our case, "the event that created the right to sue" or the "last event necessary to make an actor liable for the alleged tort," occurred in Alabama when Judge Wynn approved the $56M settlement. Even under a strict lex loci delicti analysis, ignoring the parties' contract and ignoring the fact that the fraud victim was a certified class, Alabama law applies because literally every material event occurred in Alabama and/or was connected to the settlement of a lawsuit in an Alabama state court.

Another federal district court case that seems to principally rely on the last act necessary

to create the tort is *Gulf States Steel, Inc. v. Lipton*, 765 F. Supp. 696, 701, n. 2 (N.D. Ala. 1990) *aff'd*, 934 F.2d 1265 (11th Cir. 1991) (emphases added):

> GSS contends that Alabama law should not apply to the entirety of the fraud claim. It notes that the misrepresentations were alleged to have occurred in three states: Alabama, Ohio and Florida. Under Alabama choice of law rules, however, it is not the site of the alleged tortious act that is relevant but the site of the injury, or the site of the event that created the right to sue. See *Alabama Great Southern R.R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892). It is undisputed that the "last necessary act" — the extension of credit in reliance on the alleged misrepresentations — occurred in Alabama. Therefore, Alabama law controls.

More analogous than Defendants' citations (though still not involving a fraud-in-a-class-settlement situation) are cases discussing choice-of-law in the context of an alleged fraud in a court settlement. There are no known fraud-on-a-class cases, but there are individual cases where claims were made about fraud in a settlement and the courts held that the law of the state where the settlement court was located is the law applicable to such fraud-in-the-settlement claims. Florida is not a lex loci state, but this case still has some illustrative value. In *Florida Evergreen Foliage v. E.I. Du Pont De Nemours & Co.*, 135 F.Supp.2d 1271 (2001), plaintiff first sued Du Pont in Florida and settled in 1994. This new suit was filed in 1998, alleging that Du Pont had fraudulently induced plaintiff into settling for too little money by withholding discovery and making false statements. At 1278, the Court determined that Florida tort law would apply to the fraud-in-the-settlement claim because, primarily, the "the original state lawsuits in which Plaintiffs allege they were fraudulently induced to settle were brought in Florida, and the cases were settled in Florida."

Connecticut applies a mixture of lex loci and Restatement Second law. *Spencer v. Hartford Financial Services Group, Inc*., 256 F.R.D. 284, 299 (D. Conn. 2009). This case holds that, generally, the substantive law to be applied to a fraud-in-the-settlement claim is the law of

the state where the lawsuit was settled (unless, perhaps, the parties had a contract selecting Connecticut law to apply to the settlement). *Id*. at 299-300. At 299-300, the Court held (emphasis added):

> Both the lex loci and Restatement approaches favor applying **the law of the state where the settlement was negotiated**. . . . Furthermore, many (although not all) of the settlement agreements contain a choice of law clause pointing to the state where the settlement was recorded. . . . While not dispositive on the tort claims, it reflects those parties' understanding that the laws of the state in which the agreement was entered into . . . would govern any future claims.

This line of cases makes good common sense. One would naturally assume that the tort law of Alabama would apply to a case alleging that an Alabama court-approved settlement and judgment was procured by fraud, no matter in what state the particular plaintiff might reside.

Even on a blank-slate, issue-of-first-impression analysis of choice of law, we cannot ignore or escape the uniqueness of this case - i.e., that this fraud was committed in the context of a class action. Those unique facts impact any traditional choice-of-law analysis. A class, like a corporation, can only act through its agents. The class, and each individual absent class member residing outside of Alabama was defrauded in Alabama when its class counsel, appointed in Alabama by an Alabama court, relied on representations in an Alabama court about limited insurance. The class's fiduciary, the court, was an Alabama court, which relied, in Alabama, on representations made in an Alabama court. The tort was completed in Alabama by the entry of final judgment approving the settlement in an Alabama court.[24] The injury was the entry of that

[24] [This is an aside, a merits-related comment: Arguably, because Court approval is the necessary last act to a class settlement, all that matters in this fraud-in-the-class-settlement claim is what the Court was told and provided. Everything that happened in the preceding months is arguably irrelevant. Judge Wynn was not given or told about any press releases or SEC filings. Thus, the Plaintiffs may be able to prove the merits of their claim solely by proving the hearings of May and July 1999, and what went on in between, rendering moot or irrelevant all discussions

order in Alabama in July 1999. The last act necessary to complete the tort was done in Alabama, and done at a time when there was a certified class in existence. That certified class was an Alabama entity created in Alabama, and it was defrauded and injured in Alabama. The parties agreed that, "[t]his Stipulation shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of Alabama." Delivery of the fraudulently-low settlement funds was deemed made in Alabama. That was the injury and the place of injury. Literally every relevant fact happened in Alabama or was closely-connected to the settlement of an Alabama civil action. Alabama is "loci" in the lex loci delicti choice-of-law analysis.

There is no merit to this conflict of laws issue. Alabama law applies. For purposes of its rigorous analysis, Plaintiffs urge the Court to consider and rule on every facet of this issue, even though the Court believes that just one facet would decide the whole issue. Specifically, Plaintiffs contend that this record proves: (1) the conflict of laws issue is untimely and can be rejected on that basis alone; and (2) all the parties (these Defendants, the class, and every class member) agreed in 1999 that Alabama substantive law would apply to every aspect of the settlement, and an allegation of fraud in that very same settlement is encompassed by the choice of law agreement; and (3) because this case is properly categorized as involving a fraud on a single class, that single class entity was an Alabama entity defrauded and injured in Alabama, making Alabama law applicable to the whole case and all class members; and, finally, even if arguments 1, 2, and 3 fail, (4) Alabama law applies to all aspects of this case and all parties and class members because the claim alleges a fraud in the settlement of an Alabama case in an Alabama state court.

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about who read what press release and when. But, that is a merits issue.]

X. THE OVERARCHING ISSUE IS WHETHER THIS CASE PRESENTS NOTHING MORE THAN THE USUAL "INDIVIDUAL RELIANCE" TYPE OF FRAUD CLAIM, OR, INSTEAD, WHETHER THE FRAUD WAS COMMITTED ON THE CLASS ITSELF

Plaintiffs will strive to keep this section as short as possible and not repeat previous-filed briefs. But, this is the most critical issue, and it requires a detailed analysis. This theme - whether or not proof of individual reliance is required - runs throughout this entire brief, and it was throughly argued at the five-day certification hearing. Plaintiffs' principal argument on this reliance issue, drafted by Professor Rubenstein, appears at pp. 90-106 of Plaintiffs' May 4, 2012, brief. Plaintiffs will not further burden the Court by repeating those arguments here, but they urge the Court to re-read that section of the May 4th brief in conjunction with Plaintiffs' reply argument, stated below.

As addressed toward the end of this final section X, a decision that individual reliance must be proved is not a death kneel to certification. Plaintiffs contend that they still can prove individual reliance on a class-wide basis; but Plaintiffs' primary position is that this case does not even get into that posture because individual reliance is not a necessary element of a fraud-in-the-class-settlement lawsuit.

This is the core issue. This is where the parties completely part ways and present diametrically opposed theories of the case. There is no middle ground or point of compromise. The Court is presented with a clean, black-or-white issue for judicial determination. David Hymer (Hearing Transcript p. 265) summed up Defendants' position and the parties' opposing views this way:

> The only thing I want to say in kind of summing up where we are, we kind of started the day with the plaintiffs making the argument that somehow this case is different than every other case that has ever been decided related to class

> certification of fraud claims. . . . We believe it is like any other case. It is a fraud case. As Chris said, it is a fraud on a bunch of people trying to collect money damages. And every fraud case on a bunch of people who are trying to collect money damages . . . is not a case that's appropriate for class treatment."

Similarly, Bruce McKee told the Court:

> The defendants' objection to class certification is this. The defendants contend that commonality, typicality and predominance of common issues do not exist in this case, because this is a case of individual fraud where each individual class member has to prove his own reliance. . . . We say that's . . . the gist of this case. Is this an individual fraud case or is this case different and unique, because the fraud was committed, not on a bunch of individuals, but the fraud was committed on a class. Therefore, you can prove the fraud in the class by a class.

(Hearing Transcript p. 127.) The battle lines are drawn and, we think, the issue is sharply drawn and clearly presented, by both sides.

Again, Defendants' primary (and we say the only "real" issue) opposition to certification is their contention that commonality, typicality, and predominance do not exist because this is a case of individual fraud where each individual class member must prove his own individual reliance. Defendants, of course, cite no case that holds that. No one has been able to locate a reported case or article that involves the allegation that a class action settlement was procured through fraud by the defendants. Therefore, Defendants cannot honestly deny that the facts of this case are truly "unique" and that this Court is presented with a case of first impression for which there is no direct precedent from any American jurisdiction.

Defendants' citations to ordinary fraud cases where each individual class member dealt with the defendants or acted on defendants' representations directed to them simply are not helpful. Those cases are not analogous. None of the reliance cases cited by Defendants are remotely similar to a fraud on a class or a fraud in a class settlement. Plaintiffs urge that everything about this reliance issue must be processed through the unique setting of a class

action. That is, every issue must start with recognition that the fraud was perpetrated on a class.

In 1998-99, Defendants dealt with a putative class, then a certified class.[25] Defendants did not negotiate with or communicate to individual absent class members. Defendants did not write or phone any shareholders. Defendants did not provide some shareholders with special knowledge and withhold from others.[26] All class members were treated identically.

This is not a securities fraud case. This is not the underlying case where each shareholder had some duty to look after his own involvement. The opt out notice told the class members they had lawyers appointed to look out for them and a court to conduct a fairness hearing and to be the final arbiter of fairness. The unique law of class actions permits absent class members to do nothing - to even avoid any decisions. By not opting out, they, as a matter of law, chose to rely on their lawyer-agents and court-fiduciary. They bound themselves irrevocably to the CLASS PROCESS. It does not matter what an individual shareholder knew about press releases or 10-Qs - - - their claims were merged into one class and they threw in with the class, for good or bad.

We think the corporation analogy is the most apropos. If a person sets out to defraud a

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[25] "Additionally, it is well settled that '[w]hen the ... court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the named representative].' *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (citing *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 557, 42 L.Ed.2d 532 (1975)). Consequently, the plaintiffs' class in the instant case had a legal status and interest separate from the interest asserted by Audrey Pinkston. . . ." *Corbitt v. Mangum*, 523 So.2d 348, 351 (Ala. 1988).

[26] Even if Defendants mailed an annual report to some class members and not others, that does not affect their reliance because it was publicly-published information available to the general public. In fact, Defendants' primary position on the merits of their affirmative defenses is that this disclosure was legally sufficient to disclose the unlimited insurance and is binding on the whole world.

corporation, he would deal with and defraud the CEO or the appropriate agent assigned to that topic or transaction. The fraudster does not communicate with and attempt to defraud thousands of shareholders. Here, the class was defrauded and Defendants committed the fraud by dealing with the class's agents and ultimate fiduciary, the Court.

The basic premise we start with in analyzing reliance is that this case is literally unique. It is a class action about a class action. A class was the victim of this fraud.

Absent class members do not conduct class litigation. That is done by class counsel and class representatives. If you defraud them, you have defrauded the class. The very nature of a class action is that the absent class members do nothing and are not expected to or required to do anything.

In the absence of any case law regarding frauds on a class, Prof. Rubenstein[27] opines (which argument Plaintiffs adopt) that the closest analogy is principal-agent law and entity (e.g., corporation) law because a class action is an agency driven process. If the agent is defrauded, the principal is defrauded.[28] A plaintiff's relevant proof is that the agent relied.

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[27] For the Court's recollection, "Professor William Rubenstein '86 has accepted a tenured offer to join the Harvard Law School faculty. He is an expert in civil procedure whose scholarship focuses on class action law, and he is a celebrated teacher who has won several teaching awards. 'Bill Rubenstein is one of the leading procedure scholars in the nation, known especially for his influential work on class action suits and other complex litigation,' said Dean [now Justice] Elena Kagan '86. 'He is also one of the most acclaimed teachers in the legal academy. Both his scholarship and his teaching benefit from his longtime experience as an innovative and remarkably successful litigator. It is truly a pleasure to add someone of so many and varied talents to our faculty.'" www.law.harvard.edu/news/2007/08/06_rubenstein.html (emphasis added).

[28] The Restatement 2d of Agency states, in §315, that: "A person who fraudulently obtains a contract through, or enters into a transaction with, an agent acting within the scope of his power to bind the principal, or who by fraud causes the agent to do what would be a violation of his duty to the principal if the agent knew the facts, is subject to liability to the principal

Here, the Defendants have not denied that class counsel operates as agents for the class. Defendants do not deny that the Court operates as a fiduciary (a guardian) for the absent class members. Defendants further do not deny that fraud on an agent is imputed to the principal, at least as a general rule. Therefore, if we successfully prove at the merits trial that the lawyer-agents and Court-fiduciary relied, then we have proved that the class relied and that each class member satisfies the reliance requirement without the necessity to prove individual reliance by each of the thousands of shareholders.

Defendants' objection to Prof. Rubenstein's principal-agent analogy is articulated at page 35 of their May 15th brief. They say that individual class member evidence is still needed because a principal (i.e., the class) might have greater knowledge about the truth than the agent. Plaintiffs admit this can be true in an individual case, where the principal is a single individual. But, Plaintiffs deny that this legal point has application to an entity situation like we have here (where the class is the entity).

In an entity situation, the entity can be defrauded by fraud on an agent even though some other uninvolved employees or persons within the entity know the truth. A class is closely analogous to an entity like a corporation. The lawyer-agents in 1999 represented a class, not an individual principal or a group of individuals. Like the shareholders in a corporation, an absent class member can sit back and do nothing and rely on their agents.

Analogous corporation cases hold that the corporate entity can bring a fraud claim if its agent was defrauded, even though there were some corporate employees who knew the truth - as long as those persons were not assigned to the project. The defendant is liable for fraud if the

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whether the fraud is practiced upon the agent or upon the principal."

defendant defrauded the agent who was assigned to that duty.

An Illinois Court [cited more fully below] put it this way - "To blindly preclude recovery for deceit practiced upon a corporate agent merely because a fellow employee knew the truth would make corporations safe marks for fraud." By the same analysis, to enable a defendant to defraud a class's lawyer-agent and the court-fiduciary and then insist that a class cannot be certified, because each class member has to prove individual reliance, would make classes "safe marks for fraud." That surely cannot be the law.

If these Defendants' position is accepted - i.e., that individual reliance has to be proven in a suit for fraud on a class - then there can never be an effective remedy, because there can never be a class action to rectify a fraud on a class.[29] Every defendant in the future can lie about their insurance or assets and settle on the cheap. Then, even if the fraud is later discovered, there is no effective legal remedy because no class can be certified. In such a bleak legal future, there would be no incentive for any class defendant to be truthful with the Court or with class counsel. So, let us make no mistake, what the Defendants are asking this Court to do is a truly remarkable thing - to hold that fraud on a class can be engaged in with impunity.

Our primary point in our reliance analysis is that the class is the principal, just like a corporate entity. In an entity situation, the principal's individual knowledge is irrelevant. Entities work through agents. The actual knowledge of others within the entity is irrelevant if the agents designated to that task were defrauded.

Prof. Rubenstein also briefed the *Shutts* case and the concept of due process. See

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[29] As argued below, Plaintiffs contend that, if required, they can prove individual reliance on a class-wide basis. But many other future hypothetical situations would not lend themselves to such proof of individual reliance, and, in those cases, the fraudsters would get off "scot free."

Plaintiffs' May 4, 2012, brief, beginning at p. 101. *Phillips Petroleum v. Shutts* was decided by the United States Supreme Court in 1985. Even though most of the plaintiff class members had nothing to do with Kansas and had no personal jurisdiction in Kansas, the Court rejected defendants' arguments and held that non-Kansas class members did not have to opt in. *Shutts* holds that absent class members have a due process right to do nothing and let class counsel and the Court manage the case and operate as their agents.

Members of the 1999 class had a right to do nothing and to rely purely on the lawyers and the Court. To make them now have to come forward and each of the thousands prove their individual reliance violates the rights granted to them by *Shutts*. As a practical matter, it would require them to take affirmative action and to, in practical effect, "opt in" to this lawsuit to get relief. That seems to violate the whole concept of having a class in the first place. This due process concept is another example of how this case is literally unique - a class action about fraud committed on a class.

Shutts allows absent class members to do nothing - they do not have to make any choices at all - that's the whole point. They do not have to rely on their own judgment or make any decisions in "reliance" on anything. The term "reliance" is really being misused by the Defendants in this case, in our view. When one uses the word "reliance" in this case, one ought to recognize that "reliance" in a class context includes doing nothing: the members "rely" on the lawyers and Court. **So, when a defendant defrauds the agent-lawyer and Court-fiduciary, the class and all absent class members are defrauded, too**.

As a corollary to the class members' due process right to do nothing, Plaintiffs urge this principle: Just as a class member had to give up his individual rights in order to participate in the

class, he also gained the right, as a member of the class, to rely on the Court's judgment as to the fairness of a proposed settlement. That is, a class member would have a due process right to be able to rely on the Court's reliance. In other words, if one is bound as a member of the class, one should also receive the benefits of being a member of the class. Prof. Rubenstein identified one of those rights as the right to do nothing. Depriving a class member of that right, by requiring individual proof of individual reliance seems to be a due process violation.

We contend that this is not a case that involves individual reliance. We urge the Court to completely reject any notion that every class member must prove individual reliance on the defendants' misrepresentations and suppressions. [However, even if the Defendants' notion of deposing each class member has any credence at all, that notion or concept still does not prevent certification of the fraud claim, because what the Defendant's concept relates to are properly categorized, if anything, as affirmative defenses. The general rule, which would fit this case, is that individual differences in affirmative defenses do not prevent certification. See section VII, *supra*.]

We contend that the Plaintiffs' proof of the type of "reliance" necessary in this case of first impression is:

> (1) a class action embeds several principal-agent relationships, namely that class counsel and the class representatives are agents for the class and that the Court is a fiduciary for the class;
> (2) in a principal-agent situation, the agent's reliance can be imputed to the principal;
> (3) that such imputed reliance is especially appropriate in a class suit given the Supreme Court's holding in *Shutts* that class members are not required to do anything but may sit back and rely on their agents; and
> (4) therefore, by demonstrating that either class counsel or the class action court relied on the alleged misrepresentations and omissions, we have satisfied the "reliance" requirement.

For this reason, reliance is a common question of fact across the whole class and should not impede class certification on predominance grounds. Conceding, as they must, that a principal-agent relationship exists, the heart of the Defendants' argument lies in this passage of their May 15th brief, at p. 33 (emphasis added):

> Even if the knowledge of an agent or fiduciary is imputed to the principal (here, the class member) for purposes of a fraud claim, the actual knowledge of the principal is still relevant to the claim. The principal may have greater knowledge or understanding than his or her agent. The principal, in that circumstance, surely cannot maintain a claim based on his agent's ignorance. Similarly, an agent's alleged reliance on a statement cannot stand in for the principal if, in fact, the principal relied on other information or statements in making a decision. If an individual member of the putative class had full knowledge of one or more of the five separate disclosures about the excess insurance, interpreted those disclosures to mean that the available insurance was more than sufficient to cover any settlement or judgment, and felt that the $56 million settlement was fair regardless of the amount of insurance available, those facts would be relevant to the <u>defense</u> of that individual putative class member's case.

For this reason, defendants argue that they will be "entitled to inquire whether a putative class member read any or all of the five public disclosures by MedPartners concerning the excess insurance" (p. 32 of May 15th brief) and to "perform this [individualized] inquiry for a class potentially numbering in the tens of thousands would . . . cause individual issues [to] predominate over the common claims." (p. 33 of May 15th brief, internal quotation omitted). Defendants argue (*id.* at pp. 33-34) that *Shutts* supports their entitlement to individualized treatment of the class members.

The defense therefore contains two elements: First, that in a principal-agent situation, while an agent's reliance can be imputed to the principal, the principal's actual knowledge may trump this imputed reliance. Second, that because a principal's knowledge is relevant, they therefore have the right to depose every class member to ascertain his/her individual knowledge –

and hence these individualized issues preclude certification on predominance grounds. The Defendants' arguments fail on both counts: First, in an entity situation, an agent's knowledge will be imputed to the principal and the fact that others at the entity may have knowledge of the purported fraud will ***not*** defeat that imputation. While a class in a class action is not precisely like a corporate entity, given the Supreme Court's decision in *Shutts* that class members need do nothing in a class suit, the class is in fact more analogous to an entity (like a corporation) than it is to a collection of individuals. Second, at best, the Defendants' argument creates an affirmative defense (e.g., the agency argument makes out a prima facie case of reliance and their desire to depose each class member one-by-one is a defense to that *prima facie* case); but, as discussed in section VII, *supra*, courts are reluctant to permit affirmative defenses to defeat class certification and the defendant bears the burden of demonstrating by substantial evidence that such affirmative defenses will indeed require individualized assessments.

In a principal-agent situation, a principal may sue when its agent has been defrauded and, in such a suit, the agent's reliance is imputed to the principal. The principal need not demonstrate that it relied as well. In an ordinary individual principal case, an individual principal may generally not bring a fraud claim, despite fraud on its agent, if the principal was aware of the nature of the misrepresentation. See, for example, *Su v. M/V S Aster*, 978 F.2d 462, 473 (9th Cir. 1992) ("Yet if the principal knows the true facts, the attempted deception may not be imputed to the principal."). This implies that, in a principal-agent reliance situation, the defendant should be able to question the principal as to his/her actual knowledge.

However, the present case is very different from typical principal-agent cases for one critical reason: here, the agents represented a class in a class action, not an individual or group of

individuals. As a collective body, the class in a class action is more like a corporation than like an individual principal. The critical point of *Shutts* is that, like shareholders in a corporation, the class members in a class action may sit back and do nothing, relying on their agents and the court/fiduciary's oversight of those agents. The Defendants are correct that *Shutts* safeguards an individual's right to notice and to opt out of a money damages case (p. 34 of May 15th brief), but these due process safeguards are in place as safety valves – the general rule of *Shutts* is that class members need not do anything. Indeed, in its two key holdings in *Shutts,* the Supreme Court explicitly rejected the arguments that the court must have personal jurisdiction over the absent class members and that absent class members must be required to opt-in to a class suit. It rejected both arguments precisely because class members have a right to do nothing, to be passive not active participants in a class suit. It is true that, just as shareholders in a corporation may sell their shares, class members may opt out of a class settlement, but that does not make them active participants in running the class action; their agents, overseen by their fiduciary, do that for them.

We contend that the Defendants get this *Shutts* concept precisely wrong at p. 34 of their May 15, 2012, brief. Defendants say, "to say that class members may choose to take passive roles in the class action is not to say that they must . . ." - but the phrase shows a misunderstanding of *Shutts*. The phrase says that class members may "choose" to take a passive role; but the point of *Shutts* is that class members do not even have to do that – they can remain willfully ignorant of the whole case, never making any "choice" whatsoever, in reliance upon their agents. Given that their claims are typically small, this is often the logical approach. Thus, it is the defendants who get Shutts "exactly backwards" (p. 33 of May 15th brief) (emphasis

added) in stating: "Absent class members must rely on their own judgment in deciding whether or not to participate in a class action, and their decisions whether or not to do so, and to what extent, are paradigmatically individual." Actually, *Shutts* stands for the opposite proposition: that absent class members need ***not*** rely on their own judgment.

Similarly, in the corporate setting, the corporation's agent is the designated representative voice of the corporation, and, if that representative relies, the actions of others within the corporate structure are irrelevant. For example, in an Illinois appellate case, a corporation's agent was defrauded; the defendant argued that other employees in the corporation had actual knowledge of the misrepresentation. The court found this to be irrelevant: as long as the corporation's designated agent was deceived, the entire corporation was deceived and individual knowledge is irrelevant:

> Corporations typically have a large number of employees, and it would not be reasonable to expect each of them to be aware of all the knowledge obtained by every other corporate employee. To blindly preclude recovery for deceit practiced upon a corporate agent merely because a fellow employee knew the truth would make corporations safe marks for fraud. In an action for deceit, therefore, *the appropriate focus is on the knowledge of the agent who was deceived*, and "[a] person * * * who by fraud causes the agent to do what would be a violation of his duty to the principal if the agent knew the facts, is subject to liability to the principal whether the fraud is practiced upon the agent or upon the principal."

Chicago Title & Trust Co. v. First Arlington Nat. Bank, 454 N.E.2d 723, 728 (Ill. App. Ct. 1983) (emphasis added).

In a second Illinois action, misrepresentations were made to an acquiring company about the acquired company's contractual obligations. These obligations had and would continue to cause significant financial losses. One of the acquiring company's employees had accurate information about these specific contracts, but because he was not in charge of the acquisition,

his knowledge did not affect the subsequent fraud claim.

> Knowledge gained by a corporate agent while acting within the scope of his or her agency is normally imputed to the corporation if the knowledge concerns a matter within the scope of the agent's authority. However, corporations would be easy targets for fraud if they were precluded from recovery merely because one employee knew the truth. Instead, examination of the reliance element focuses on the knowledge of the corporate agent who was deceived.

Vigortone Ag Products, Inc. v. PM Ag Products, Inc., 217 F. Supp. 2d 858, 865-66 (N.D. Ill. 2001) (citing *Chicago Title and Trust Co. v. First Arlington National Bank*, 118 Ill. App.3d 401, 407, 73 Ill. Dec. 626, 454 N.E.2d 723, 728 (1983) (internal quotes and citation omitted)). See also *Chamberlain Mfg. Corp. v. Maremont Corp*., No. 92-C-0356, 1995 WL 723758 (N.D. Ill. Dec. 6, 1995) (affirming jury instruction that "knowledge or reckless disregard by some [plaintiff] employees that [defendant's] statements might be false would not defeat [plaintiff's] claim of reliance on [defendant's] representations, if [defendant's] representations were made to different employees of [plaintiff]").

The importance of this point is evident when applied in the more common, inverse case, i.e., situations where the principal is being sued for the actions of its agent and is not permitted to disown its agent's action. This argument invokes ratification theory. If a principal authorizes or appears to authorize its agent's actions, it is strictly liable for those actions. *Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 802 F.2d 963, 966 (7th Cir. 1986) (discussing vicarious liability in the commodities context) ("Principals are strictly liable for their agents' acts – even if the agents are not employees – if the principals authorize or ratify the acts or even just create an appearance that the acts are authorized. This is so even though in a case of ratification or apparent authority the principal does not himself direct the act and may indeed know nothing about it when it occurs, as [the principal in this case] (we may assume) knew nothing of [the

agent]'s fraud."); *Foley Co. v. Scottsdale Ins. Co.*, 15 P.3d 353, 357 (Kan. Ct. App. 2000) ("Under agency law, once a principal knows of an agent's unauthorized actions, it cannot sit back and see if it will benefit or suffer from the agent's actions. Instead, a principal who receives notice of an unauthorized act of an agent must promptly repudiate the agent's actions or it is presumed that the principal ratified the act. Ratification is the adoption or confirmation by a principal of an unauthorized act performed on its behalf by an agent."). If a principal "sits back" and lets the agent operate on its behalf, a third party who relies on this appearance of authorization can sue the principal for the agent's acts whether or not the principal knew of the wrongful acts. <u>But a principal burdened thusly should also receive the benefit of the relationship</u>. If class members "sit back" – as *Shutts* permits them to do – and let the class representative vindicate their claim, what they knew or did not know is similarly irrelevant because their will has similarly merged with the agent's.

Finally, the policy reasons that courts have adopted this approach to reliance in the entity setting apply perfectly to the class suit. Specifically, the courts adopting this "only the agent's reliance matters" approach note that the opposite outcome – "To blindly preclude recovery for deceit practiced upon a corporate agent merely because a fellow employee knew the truth" [*Chicago Title*, 454 N.E.2d at 728] – "would make corporations safe marks for fraud." *Id*. So too, to enable a defendant to defraud a class's agents and the class's fiduciary – the class action court – and then insist that each class member show individual reliance would make classes "safe marks for fraud." It is especially remarkable that the defendant would make this individualization argument while simultaneously insisting that the underlying class suit binds and precludes all of the class members by virtue of their agents' actions, without regard to any

individualized action or understanding on their behalf. Surely, if the defendants may take advantage of the class members' imputed reliance to get preclusion, they must suffer the class members' imputed reliance where they are alleged to have defrauded the class.

In sum, the Defendants attempt to turn the class action into an *individual* principal-agent relationship when in fact it is an *entity* principal-agent relationship. The principal's individual knowledge is pertinent in an individual fraud case where the principal claims imputed reliance through her agent's reliance. But the principal's individual knowledge is simply irrelevant in an *entity* situation because entities work through agents and the actual knowledge of others within the entity is irrelevant if the designated agents were defrauded. If the Court agrees that our case is more like *entity* principal-agent relationship than an *individual* principal-agent relationship, then the question of Individual Reliance is answered in Plaintiffs' favor and the motion for certification is granted.

Defendants attempt to evade the principal-agent approach to reliance by arguing that each class member's individual knowledge is relevant to the reliance question, and, hence, that the reliance inquiry will be individualized and therefore defeat certification on predominance grounds. Defendants' argument ignores the entity nature of the principal-agent relationship here, a relationship that lessens the importance of the principal's actual knowledge. Moreover, Defendants' argument amounts to an affirmative defense; yet they have cited no facts in support of this defense (not a single instance in which a class member did have knowledge of the alleged disclosures and nonetheless concluded he/she was not being defrauded) and they have cited no law in support of this argument.

Attached hereto as Exhibit A is a copy of the 28-page order this Court issued on April 14,

2003, in *Martin v. SouthTrust Bank, N.A.*, No. CV-2001-7367-TK. This Court certified a fraud class action (the case settled while on appeal) that presented a very similar Individual Reliance issue - in the context of a trust instead of a class. This Court found that individual bondholders' proof of their individual reliance was not necessary because a trust operates through its trustee. Here are some quotations from pp. 20-26 of that order (emphases added):

> A factor that distinguishes this case from any other case cited by defendants is the Trustee-Bondholder relationship. The significance of the relationship here is that the general common law rule holds that the duty is on the Trustee to protect and preserve the Trust property and therefore the Trustee has a duty to sue for damages to the property. . . . Further, the Bondholders appointed the Trustee as their irrevocable agent and attorney in fact for the purpose of enforcing all rights of action. <u>Therefore, in considering whether individual questions exist, it is important that all remedies and rights of action were vested in the Trustee</u>. . . .
>
> When considering the predominance criterion of class certification, the trial court must determine whether a group exists "which is more bound together by a mutual interest in the settlement of common questions than it is divided by the individual members' interest in matters particular to them." *Ex Parte AmSouth Bancorporation*. 717So.2d 357(Ala. 1998). Here, it is clear that with respect to MHA's contention regarding potential individual questions regarding the duty to disclose, the bondholders were "bound together by a mutual interest." To prove reliance in a suppression case, the plaintiff must show that the suppression of the fact induced plaintiff to act or to refrain from acting. *Ex parte Household Retail Services. Inc.,* 744 So.2d 871 (Ala. 1999). Thus, the issue of reliance necessarily turns upon whether the aggrieved party would have acted or refrained from acting. Such analysis of reliance leads to the conclusion that <u>the duty to disclose in this case was to the Trustee, and not to the individual Bondholders</u>. This is so because under the express provisions of the Indenture, all remedies, i.e., rights to act, were vested in the Trustee. . . .
>
> [O]nly the Trustee could enforce remedies. Therefore, any disclosure to the individual class members would have been virtually meaningless. Given the circumstances of this case including, the course of dealing between Associates and the Trustee, the Trustee, Bondholder relationship, and the vesting in the Trustee of all remedies, the duty to disclose in this case owed by Associates and MHA was to the Trustee. <u>Thus, the issue of whether MHA had a duty to the Trustee involves no issues individual to the class members</u>.
>
> Even if the Trustee were not the party to whom the duty was owed, the Court finds no individual issues related to the issue of duty to the Bondholders. MHA has failed to explain how it may have owed a duty to disclose to one

> Bondholder but not to another. It is clear that the duty to disclose, if any, was to the Bondholders as agroup as they were bound together by a mutual interest.
>
> Further, the requirement that this Court conduct arigorous analysis of the defenses is fatal to MHA's argument regarding the tolling of the statute of limitations. In that regard, the duty of MHA, Associates and/or Group totheTrustee also answers the statute of limitations tolling issue. Because all remedies were vested in the Trustee, the issue of tolling turns upon whether the Trustee knew of the offer.

Plaintiffs assert the precise scenario is presented here, just substituting "class" for "trust" and "lawyer-agents and fiduciary-court" for "trustee."

In the alternative, proof of individual reliance, if required, can still be made by class-wide proof and this motion for certification can still be properly granted. It is true that the question of Individual Reliance is the most important issue before the Court. Once the Court adopts the Plaintiffs' suggested analogy to entity principal-agent relationships and to the law of entities like corporations and trusts, the Court rules that individual reliance is not a required element of proof in a unique fraud-on-a-class-settlement claim - - - then certification naturally follows. If, however, the Court were to hold that individual reliance must be shown, even in a fraud-on-a-class-settlement claim, Plaintiffs contend that their motion for certification would still be entitled to be granted.

As to those in suggested subclass A, the answer is easy. Those subclass members proved their "reliance" by their act of filling out the paperwork and filing claims that were approved in 1999. There is no need for individual oral testimony from each one of those 18,000 persons and entities. The jury can properly infer, as to each subclass A member, that their filing of a claim was a "reliance" on the class action process, e.g., a reliance on their lawyers' work and on their court-guardian's finding of fairness (and we know from hearing transcripts that Judge Wynn was relying on the representations about insurance coverage and financial status of the defendant).

The analysis is a little different, but subclass B members (those who did not file a claim in 1999) can prove their reliance by class-wide evidence, too. The jury could properly infer and find that doing nothing was a "reliance" on the notice (which notice explained, in essence, that MedPartners was in poor financial shape and could not afford to pay more). Doing nothing and relying on the class process to be fair is exactly what *Shutts* permits. Judge Wynn first heard these insurance and financial representations at the May 1999 hearing. He then approved and issued the class opt out notice in reliance on those representations. Had Judge Wynn known about the existence of unlimited insurance, he would not have conditionally approved the settlement proposal or sent notice to the class. Thus, but for the fraud, members of suggested subclass B would never have received a notice and never would have had the opportunity to opt out or, alternatively, do nothing and stay in the class. The representations about insurance and financial condition were material to Judge Wynn and to the issuance of the notice - material as a matter of law. So, the jury could find, on a class-wide basis, that the non-act of doing nothing was itself an "act" taken in "reliance" on the misrepresentations communicated to and relied upon by Judge Wynn. Either way, filing a claim after the July 1999 final approval or not, all class members acted in "reliance" on Defendants' fraudulent misconduct, and that reliance can be proven via class-wide proof without each of the thousands of class members having to individually testify.

CONCLUSION

Plaintiffs move the Court for an order that certifies "the fraud claim" (meaning Counts I and II: misrepresentation and suppression) to proceed as a class action against all named defendants, CVS Caremark Corporation and the "AIG defendants." Plaintiff John Lauriello does not seek appointment as class representative, but the other three plaintiffs seek appointment as co-class representatives. And, undersigned counsel seek appointment as co-class counsel.

Plaintiffs seek an order that certifies the fraud claim to proceed as a "mandatory" class action, pursuant to Rule 23(b)(1), Alabama Rules of Civil Procedure. Additionally, or in the alternative, Plaintiffs seek certification of the fraud claim as an opt-out class, pursuant to Rule 23(b)(3).

The proposed class definition, as modified to exclude the 79 members who opted out in 1999, is quoted at page 6, *supra*. Plaintiffs suggest, for administrative purposes, two subclasses, but that issue is not necessary to address at this stage of the litigation. The subclasses would be: (A) class members that submitted claims to the claims administrator in the 1998 MedPartners Securities Litigation and were found to be authorized claimants and to have an allowed loss, as those terms have been defined by the claims administrator; and (B) class members who did not submit claims to the claims administrator in the 1998 MedPartners Securities Litigation.

Respectfully submitted this the 15th day of June, 2012.

s/ John W. Haley
One of Plaintiffs' Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Clerk of Court and counsel of record using the AlaFile system which will send notification of such filing to the parties listed with the Clerk, on this the 15th day of June, 2012.

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