AlaFile E-Notice

01-CV-2003-006630.00

Judge: TOM KING, JR.

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

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

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

AMES O. FINNEY, JR., et al.,	)	
	)	
Plaintiffs,	)	
	)	
s.	)	**CV-2003-006630.00-TK**
	)	
CVS CAREMARK CORPORATION,	)	
et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
VIRGINIA GREENE HOFFMAN,	)	
	)	
Intervenor.	)	

ORDER ON MOTION FOR CLASS CERTIFICATION

This action was commenced on October 22, 2003, and is before the Court on Plaintiffs' MOTION FOR CLASS CERTIFICATION in which the Plaintiffs, James O. Finney, Jr., Sam Johnson and the City of Birmingham Retirement and Relief System, seek an order certifying Alabama Rule of Civil Procedure Rule 23(b)(1) and 23(b)(3) class action against the Defendants.

The Plaintiffs seek to certify the class 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; or (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").

Plaintiffs seek certification of their claims of fraudulent misrepresentation and fraudulent suppression against Defendants Caremark Rx, Inc. ("Caremark"), American International Group, Inc. ("AIG"), National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), AIG Technical Services, Inc. ("AIG Technical Services"), and American International Specialty Lines Insurance Company ("AISLIC") (excluding Caremark, the "AIG Defendants") (collectively, "Defendants").

The Court conducted a five day evidentiary hearing from May 30, 2012, through June 4, 2012. The Court states for the record that this Order is not an order which was submitted by either side, but is the result of the Court's own rigorous analysis of the evidence and of current Alabama law regarding class certification. Bill Heard Chevrolet Co. v. Thomas, 819 So. 2d 34 (Ala. 2001).

The Court is also acutely aware of the many appellate decisions in this state which have sharply reined in class certification since the enactment of the Alabama Class Action Statute in 1999. Nevertheless, Rule 23 has not been repealed and, in the appropriate case, the Alabama Supreme Court has shown its willingness to affirm a trial court's certification of a class action. Where the legal criteria have been satisfied, class actions remain a useful tool for a trial court to remedy wrongs. In certain cases where a wrong has been committed, it is not practicable for an individual plaintiff to pursue a legal remedy simply because the individual's damages are too

small to warrant legal action. In those cases where the requirements of Rule 23 are met, class certification is the only available method of remedying the wrongful conduct.

Following a thorough and rigorous analysis of both the facts as found from the presented evidence and the law as pronounced by the Alabama Supreme Court and the State of Alabama Legislature, the Court enters the following findings.

I. FACTS

The Court, the parties and the Alabama Supreme Court are well versed in the storied history of this nearly nine year old case. However, the Court deems it necessary to lay out some of the more pertinent facts in order to discuss its rationale. It is also important to note that most, if not all, of the facts in this case are undisputed.

A. The 1998-99 MedPartners Security Litigation

In 2002, Chuck Newhall, a former board member of MedPartners, testified that "[w]hat was going on at MedPartners was basically the equivalent of Birmingham's Enron." 2002 Trial Transcript, at Page 315. He went on to testify that he thought "it was a very, very serious public scandal . . . it was really sickening." Id. at 327 and 349.

The current action, which was initially filed on October 22, 2003, arises out of the settlement of a nationwide class action styled Griffin v. MedPartners, Inc. (Jefferson Circuit Court; CV-98-00297 et al.) which was filed following the discovery of "Birmingham's Enron." The settlement consolidated more than twenty similar securities and derivative lawsuits which alleged that MedPartners had made a series of false and misleading statements concerning a planned merger between MedPartners and PhyCor Inc. and concerning MedPartners' overall financial condition. This collection of cases has come to be known by all parties as the 1998 MedPartners Securities Litigation.

During the course of the 1998 MedPartners Securities Litigation, the plaintiffs learned and were told that MedPartners was near bankruptcy and that directors and officers liability coverage was Fifty Million and No/100 ($50,000,000.00) Dollars. Plaintiffs also learned that the policies were wasting assets.

On October 22, 1998, effective as of September 30, 1998, American International Specialty Lines Insurance Company ("AISLIC") issued to MedPartners the "AISLIC Policy" – the excess insurance policy that is at issue in this action. The AISLIC Policy provided unlimited coverage for the 1998 MedPartners Security Litigation. However, AISLIC retained "the right to cancel [the] coverage and refund [the] supplemental premium in the event [MedPartners was] required to and [did] disclose the material terms of [the] coverage for accounting, legal or other purposes before December15, 1998." (See AISLIC Policy § 1).

On December 17, 1998, MedPartners issued a press release which provided as follows:

> "MedPartners . . . announced today that it has entered into an excess insurance agreement with National Union Fire Insurance Company of Pittsburgh, Pa. pursuant to which National Union will assume financial responsibility for the defense and ultimate resolution of the securities litigation. . . . Mac Crawford, Chairman and CEO of MedPartners, said: 'We are pleased to have obtained this coverage from National Union. The excess insurance agreement allows MedPartners to put the uncertainty and contingent liability of this body of litigation behind us and move forward knowing that this litigation presents no material adverse financial risk to the company.'"

(See December 17, 1998 Press Release). Similar disclosures were made in four other public releases and filings. Whether these disclosures were adequate to place the world on notice of the insurance policy and its terms is a hotly contested point. However, it is undisputed that the original draft of the press release contained the following language: ". . . in exchange for a total

non-refundable premium of $22.5 million. There is no liability cap or limit on the National Union coverage and the insurance company has waived all exclusions."

Based on their understanding of the financial condition and the insurance coverage of MedPartners, counsel for the Plaintiffs' class along with counsel for MedPartners and its insurers, on January 15, 1999, executed a "Memorandum of Understanding" to settle all claims asserted in the 1998 MedPartners Security Litigation for Fifty Six Million and No/100 ($56,000,000.00) Dollars. It was later determined by MedPartners' own accounting expert, Stewart Dudley, that the actual damage to the company exceeded Three Billion and No/100 ($3,000,000,000.00) Dollars. The "Memorandum of Understanding" was signed by Richard George as "Counsel for National Union, and signed on behalf of all Defendants in the Litigation."

Following the execution of the "Memorandum of Understanding," a hearing was held on May 3, 1999 before Jefferson County Circuit Judge William J. Wynn to present the proposed settlement. During the hearing, it was represented to the Court by counsel for the proposed class that the settlement embodied in the "Memorandum of Understanding" represented the best recovery for the class due to the limited financial resources of MedPartners. (May 3, 1999 Hearing Transcript). It is undisputed that counsel for MedPartners were present and made no attempt to correct, clarify or rebut the statements made to the Court. Relying on these representations, the trial court conditionally approved the settlement.

Subsequent to the May 3, 1999 hearing, Judge Wynn, on May 10, 1999, ordered the proponents of the settlement to produce any information regarding the "financial ability of defendant to withstand a greater judgment in any amount." (May 10, 1999 Order, CV-98-00297

et al.). This Order was received by counsel for MedPartners. Additionally, Richard George, counsel for AIG, received the Order.

Furthermore, the "Stipulation of Settlement (the "Stipulation"), dated as of January 15, 1999, [was] made and entered by and among the following parties . . . to the above entitled Actions ("Actions"): (i) certain of the Plaintiffs on behalf of themselves and each of the Settlement Class Members . . . , (ii) the Settling Defendants, by and through their counsel of record in the Actions; and (iii) the Insurance Carrier, by and through its counsel." The Stipulation goes on to define "Insurance Carrier" as "National Union Fire Insurance Co. and all of its predecessors, successors, and all present and former parents, subsidiaries, divisions or related or affiliated entities." "Settling Defendants" were defined as "all of the Defendants except Larry R. House, Mark L. Wagar, and Harold O. Knight, Jr." After defining the terms, the Stipulation provided that "the Parties shall submit this Stipulation together with its Exhibits to the State Court and shall jointly apply for entry of an order . . . requesting the preliminary approval of the Settlement set forth in this Stipulation, the certification of the Consolidated Class Cases, for settlement purposes only, as a class action pursuant to Rule 23(a) and 23(b)(3), [and] the holding of the Settlement Hearing to determine whether the Court should (i) approve the Stipulation as fair, reasonable, and adequate and in the best interests of the Settlement Class and MedPartners, pursuant to Rule 23(e) and 23.1 of the Alabama Rules of Civil Procedure." The Stipulation was signed by Richard George, Counsel for the Insurance Carrier.

In support of final settlement approval, counsel for the Plaintiff class, on June 30, 1999, submitted the Joint Affidavit of Neil L. Selinger and Steven E. Cauley. In addition to other representations, the affidavit provided:

> "The principal factor considered by plaintiffs' counsel in determining to settle the [1998 MedPartners Sercurities Litigation] for $56 million was MedParnters' serious financial straits . . .
>
> "Plaintiffs' counsel, while confident of the strength of plaintiffs' claims, entered into settlement negotiations with the understanding that MedPartners was facing serious problems, including the risk that the company might have to file for Chapter 11 bankruptcy protection . . . . Plaintiffs' counsel also learned that the insurance coverage available provided for maximum benefits of $50 million, and that the policies were wasting assets, meaning that certain defense counsel fees had to be paid out of the policies, thereby reducing the total amount of recovery that might ultimately be collected from the insurers."

On July 9, 1999, a final fairness hearing was held before the trial court. Again, counsel for the plaintiff class presented evidence and argument that MedPartners was unable to withstand a greater judgment than the Fifty-Six Million and No/100 ($56,000,000.00) Dollar settlement proposed to the trial court. And again, attorneys for MedPartners and its insurer were present, but failed to respond to, correct or clarify the statements. Based on the representations made, the trial court approved the Fifty-Six Million and No/100 ($56,000,000.00) Dollar settlement stating, "I feel very comfortable . . . it's a settlement that is almost too good to be true in light of the condition of the Defendant." The final order was entered on July 10, 1999.

B. Subsequent Proceedings and the Discovery of the Alleged Fraud

During an American Arbitration Association proceeding which began in June of 2000 and lasted until August of 2001, Richard George, counsel for AIG and its affiliate companies, testified as follows:

> "Well, our primary concern was that if it [the policy providing unlimited coverage] had become widely known or even if it had become known to any more people that had to know about it, that ultimately would get to the plaintiffs and if the plaintiffs were to suddenly realize that there was this insurance above the $50 million that they were previously aware of, that was going to cause them to drive the settlement value to a much higher level than they

> would otherwise. From the plaintiffs' perspective, they were faced with a company that had $50 million of insurance and a very uncertain financial condition in the future, that was a constraint on the settlement value that they could ultimately expect to derive and **we were not going to do anything to disrupt that perspective. We were not going to let them know that there was this insurance on top. And so we kept it within as tight a group as we possibly could for fear that somehow it would come to the plaintiffs' attention."**

It is highly significant to note that the above testimony was given at a confidential arbitration proceeding at which Richard George could testify openly and honestly regarding the sale, purchase and disclosure of the excess insurance policy made the basis of this action. Furthermore, it is important to note that Richard George spent a substantial amount of time during his May 11, 2011 deposition recanting his arbitration testimony in an effort to mitigate the effect of his testimony regarding the cover up of this insurance policy.

On February 26, 2003, Jefferson County Circuit Judge Houston L. Brown granted Plaintiff J. Brooke Johnston, Jr.'s Motion to Compel which ultimately led to the production of the AISLIC Policy in September of 2003. Following compliance with Judge Brown's Order, this action was filed on October 22, 2003.

C. Nature of Plaintiffs' Claims

In this current putative class action, Plaintiffs are now operating under their Fourth Amended Complaint, filed on May 19, 2010. Plaintiffs have withdrawn their request to have John Lauriello appointed as class counsel.

Plaintiffs' Complaint in this action alleges two counts: (1) that Defendants misrepresented the amount of insurance available to settle the 1998 MedPartners Security Litigation, and (2) that Defendants suppressed information concerning the AISLIC Policy.

Plaintiffs seek judgment against Defendants for an award of compensatory and punitive damages equal to the difference between the amount of the probable settlement had the truth about the AISLIC Policy been known and the Fifty Six Million and No/100 ($56,000,000.00) Dollars which was paid to settle the case in 1999.

II. CLASS CERTIFICATION ANALYSIS

The Alabama Supreme Court has long held that class actions are indispensable mechanisms for conserving judicial resources by providing a single forum in which to litigate the claims. City of Birmingham v. Fairview Home Owners Ass'n, 66 So. 2d 775 (1953) (overruled on other grounds by Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc., 783 So. 2d 792 (Ala. 2000)). However, "[w]hen deciding whether a requested class is to be certified, [this Court must] determine, by employing a rigorous analysis, if the party or parties requesting class certification have proven its or their entitlement to class certification under Ala. R. Civ. P. 23." Ala. Code § 6-5-641. "In meeting this level of scrutiny, the members of the purported class must be analyzed in terms of their relationship to the particular claims and defenses to be asserted in the class action." Ex parte Caremark Rx, Inc., 956 So. 2d 1117, 1125 (Ala. 2006).

When moving for class certification, the plaintiffs bear the burden of proving the requisite elements of Rule 23. Ex parte Mayflower Nat. Life Ins. Co., 771 So. 2d 459, 462 (Ala. 2000). However, the certification process does not involve a mini trial on the merits. Mayflower Nat. Life Ins. Co. v. Thomas, 894 So. 2d 637, 641 (Ala. 2004). At this stage, the Court expresses no view on the merits of Plaintiffs' claims, or the merits of Defendants' defenses.

In order to certify a class action, the party seeking certification must prove the proposed class and class wide claims meet each of the four elements of Ala. R. Civ. P. 23(a) – numerosity, commonality, typicality and adequacy of representation – and at least one of the three additional

requirements of Rule 23(b). In the matter presently before the Court, Plaintiffs have moved for certification under Rule 23(b)(1) as well as Rule 23(b)(3).

Plaintiffs' burden is met if they produce "substantial evidence satisfying the requirements of Rule 23." Thomas, 894 So. 2d at 640 (citing Ex parte Green Tree Fin. Corp., 684 So. 2d 1302 (Ala. 1996)). The Court will now proceed to analyze whether Plaintiffs have met their burden with regard to each of these elements.

A. Requirements of Rule 23(a)

Alabama Rule of Civil Procedure 23(a) – Prerequisites to a Class Action- states that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity

"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 Fifty Six Million and No/100 ($56,000,000.00) Dollar settlement in 1999, it is clear there are about 80,000 potential class members, and it is certain that approximately 18,000 actually filed claims that were verified and approved. Thus, Plaintiffs have carried their burden of proving numerosity. Furthermore, Defendants do not dispute the issue.

2. Commonality

"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. As shown by facts presented above and the evidence presented to the Court during the certification hearing, the Court is convinced that there are common questions of law and fact regarding every class member. Furthermore, like numerousity, Defendants do not dispute the issue.

3. Typicality

The typicality element is satisfied only if "the relationship between the injury to the class representative and the conduct affecting the entire class of plaintiffs [is] sufficient for the Court to properly attribute a collective nature to the challenged conduct." Warehouse Home Furnishing Distributors, Inc. v. Whitson, 709 So. 2d 1144, 1149 (Ala. 1997). To meet the typicality requirement, there must be "a sufficient nexus . . . between the legal claims of the named class representatives and those individual class members to warrant class certification." Prado-Steiman v. Bush, 221 F.3d 1266, 1278 (11th Cir. 2000).

The three proposed class representatives, James O. Finney, Jr., Sam Johnson and the City of Birmingham Retirement and Relief System, have claims typical of the proposed class as each was a member of the 1999 Settlement Class.

Defendants argue that the typicality requirement cannot be met on this record because of the three subclasses – common stock, TAPS and tender offer – which existed in the underlying 1999 Settlement Class. It is Defendants' position that each of the proposed class representatives

is a member of the common stock subclass and therefore, they do not have claims which are typical of the TAPS and tender offer subclasses.

When examining whether these proposed class representatives present claims typical of the entire class, it is critical to understand that the parties are not re-litigating the underlying securities fraud claims. The claim presented in this action is for fraud-in-the-settlement. The alleged fraud did not vary depending on whether one owned common stock, TAPS or a tender offer. Any alleged fraud touched all class members identically.

It is the Court's determination that any conflicts between the subclasses were resolved in the 1999 class settlement. The three subclasses, with representation, and with joint participation of Defendants, settled all differences in Judge Wynn's court. The subclasses agreed in 1999 on a formula that defined how any class action recovery was to be distributed. All conflicts between the subclasses have been litigated and resolved.

Given the 1999 class settlement and the nature of the allegations in this action, it is this Court's conclusion that James O. Finney, Jr., Sam Johnson and the City of Birmingham Retirement and Relief System present claims typical of the proposed class.

4. Adequacy of Class Representatives

In addition to showing that their claims are typical of the putative class, Plaintiffs must show that they can "fairly and adequately protect the interest of the class" in order to satisfy Rule 23(a)(4). "Satisfaction of this rule requires that the representative plaintiffs' interest not be antagonistic to those of the class." Ex parte Masonite, 681 So. 2d 1068, 1089 (Ala. 1996). This prong of the adequacy requirement "foreclose[s] the class action where there is a conflict of interest between the named plaintiffs and members of the putative class." Cutler v. Orkin Exterminating Co., Inc., 770 So. 2d 67, 71 (Ala. 2000).

In support of their motion, Plaintiffs contend that they are respected and experienced professionals and businessmen. Furthermore, 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. Plaintiffs further argue that they have no conflicts with the claims of the class or its members.

In opposition to class certification, Defendants contend, as they did with typicality, that the proposed class representatives – all of whom are members of the common stock subclass – are inadequate due to their conflict with the TAPS and tender offer subclasses. In support of their argument, Defendants delineate the different theories of recovery alleged by the subclasses in the underlying litigation. Defendants attempt to bolster their position by stating to the Court that each subclass had its own representative and appointed class counsel in the underlying 1999 settlement.

Regarding Defendants' argument concerning the different theories of recovery in the underlying 1998 MedPartners Security Litigation, it is clear to the Court that Plaintiffs are presenting common law fraud claims which are common to each and every class member. Furthermore, it is the Court's determination, as it was when addressing typicality, that any conflicts between the subclasses were resolved in the 1999 class settlement. The three subclasses, with representation, and with joint participation of Defendants, settled all differences in Judge Wynn's court. The subclasses agreed in 1999 on a formula that defined how any class action recovery was to be distributed. All conflicts between the subclasses have been litigated and resolved.

Given the 1999 class settlement and the singularity of the fraud allegation in this action, it is this Court's conclusion that James O. Finney, Jr., Sam Johnson and the City of Birmingham Retirement and Relief System are adequate to represent this class.

5. Adequacy of Class Counsel

It must be demonstrated under Rule 23(a)(4) that proposed class counsel – Hare, Wynn, Newell & Newton; North & Associates; and Somerville, LLC – can "fairly and adequately protect the interests of the class." In order to meet such a requirement, the attorneys who represent the plaintiffs must "be qualified, experienced, and generally able to conduct the litigation." Regions Bank v. Lee, 905 So. 2d 765, 770 (Ala. 2004) (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)).

Prior to addressing the issues raised in Defendants' briefs, the Court takes judicial notice that Defendants are not arguing that the attorneys who are seeking to represent the proposed class are inadequate to handle complex and sophisticated cases of this nature. Furthermore, the Court observed on the record during the Class Certification Hearing that the attorneys, both plaintiff and defense, are profoundly respected and professional. They are among the finest attorneys in the nation. The Court makes this statement because it is true. These lawyers involved in this case are among the best in the country in handling large complex litigation. Although the Court was already familiar with proposed class counsel's respective credentials, the Court has carefully reviewed their vitaes as a function of its responsibilities in this action.

Although all parties agree that proposed class counsel are adequate to prosecute class actions, the parties disagree on whether these attorneys are competent and/or able to adequately represent this proposed class. The Court will address the issues in the order they were presented in Defendants' Pre-Hearing Memorandum of Law In Opposition to Plaintiffs' Motion to Certify the Class and Appoint Class Representatives.

a. Failure to Ascertain Fairness and Adequacy of the 1999 Settlement

In their first specific charge for disqualifying proposed class counsel, Defendants contend that the Hare Wynn and North firms did not fulfill their duties to the 1999 settlement class. Defendants argue that the alleged breach of duty of the Hare Wynn and North firms constitutes a "material limitation" conflict under Rule 1.7(b) of the Alabama Rules of Professional Conduct.

It is clear to the Court, based upon the law, that the Hare Wynn and North firms owed a fiduciary duty to all alleged class members in the 1998 MedPartners Security Litigation the moment they filed a putative class complaint on behalf of John Lauriello. By virtue of having filed that complaint, the Hare Wynn and North firms undertook a duty to the class "not to prejudice the interests that putative class action members have in their class action litigation." Schick v. Berg, 2004 WL 856298, at *6 (S.D.N.Y. April 20, 2004), aff'd, 430 F.3d 112 (2d. Cir. 2005).

However, this Court does not follow Defendants' argument that the Hare Wynn and North firms breached any duty of care to the 1999 settlement class. Defendants are essentially arguing that the Hare Wynn and North firms should have discovered the unlimited policy prior to the approval of the 1999 settlement.

First and foremost, the Hare Wynn and North firms were never appointed class counsel. Furthermore, the action which they had filed, Lauriello v. MedPartners, Inc., et al., CV 98-98 (Jefferson County Circuit Court) ("Lauriello I"), had been dismissed and was on appeal before the Alabama Supreme Court. Prior to having their case dismissed, the Hare Wynn and North firms attempted through discovery to obtain all relevant insurance policies at the Circuit Court level and were scheduled to obtain all relevant documents on the day their case was dismissed. Once Jefferson County Circuit Judge Daniel N. Rogers published his dismissal order,

MedPartners' counsel informed the Hare Wynn and North firms that discovery would not proceed as scheduled based upon the dismissal. Although the dismissal did not extinguish their duty to the proposed class, it is clear to this Court that the Hare Wynn and North firms were severely limited in what steps they could take to discover the amount of insurance available to the class.

Additionally, Defendants are estopped from arguing that the Hare Wynn and North firms were negligent in the settlement of the 1999 class actions. All Defendants were joint proponents of the 1999 class settlement. The approval of the settlement class included the appointment of class counsel which did not include the Hare Wynn and North firms. In recommending the settlement to Judge Wynn, Defendants agreed that the other lawyers, who continued to have pending cases, were adequate counsel for the class. Given the dismissal of the Hare Wynn and North firms' claims, it is obvious to this Court that the eventually appointed class counsel were in a much superior position to discover the existence of the unlimited insurance. If counsel with pending claims were adequate, then the Hare Wynn and North firms are therefore adequate.

Finally and perhaps most importantly, this Court is certain that the Defendants were not going to reveal the amount of insurance obtained during the pendency of the 1998 class actions. The record is replete with many formal and informal requests that were, in fact, made and rebuffed, e.g., Richard George. Furthermore, Defendants were under a duty to disclose the AISLIC insurance policy based upon Rule 26(e)(2)(B) of the Alabama Rules of Civil Procedure which states that "[a] party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party . . . (B) knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance **a knowing concealment**." Given the record, the Court is unaware of

anything that the Hare Wynn and North firms could have done differently which would have resulted in Defendants disclosing the amount of coverage obtained under the AISLIC policy.

b. The Alleged Fee Split with a Non-Lawyer – John Lauriello

In opposition to class certification, Defendants argue that the money received by John Lauriello from the Hare Wynn and North firms violated Alabama Rule of Professional Conduct 5.4(a), which says that "[a] lawyer or law firm shall not share legal fees with a non-lawyer." In response to Defendants position, Plaintiffs contend that the money was a reduction in attorneys' fees which is commonly done and an accepted practice in Alabama. Following an extensive review of the record, it is apparent to this Court that the payment to John Lauriello following the conclusion of the 1998 litigation does not disqualify the Hare Wynn and North firms from participation in this action.

In the settlement of the 1998 claims, a total fee was approved by Judge Wynn, with no objection or appeal. The reduction provided to John Lauriello came from this lump sum. Nothing the Hare Wynn and North firms did harmed the class or increased its fees in any way. The money was not an advanced payment to John Lauriello. This was not an incentive award to a named plaintiff class representative. The payment to John Lauriello does not reflect adversely on the Hare Wynn and North firms' ability or concerns for the classes well-being and fair treatment.

c. The Fee Sharing Agreement with Milberg Weiss

Defendants, in opposition to class certification, contend that the Hare Wynn and North firms' division of the class action fee in connection with the 1999 class settlement with the Milberg Weiss firm violated Alabama Rule of Professional Conduct 1.5(e).

Alabama Rule of Professional Conduct 1.5(e) provides as follows:

> A division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:
>
> (1) Either
>
> (a) the division is in proportion to the services performed by each lawyer, or
>
> (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or
>
> (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;
>
> (2) The client is advised of and does not object to the participation of all the lawyers involved;
>
> (3) The client is advised that a division of fee will occur; and
>
> (4) The total fee is not clearly excessive.

Concerning Defendants' position that the Hare Wynn and North firms did little work on the *Blankenship* and *Padilla* cases, the Court finds little support in the law. The Alabama Rule of Professional Conduct does not require the split to be based on the amount of work done or on the duty of joint representation. Furthermore, Defendants cite no law that indicates the Hare Wynn and North firms could be charged if Milberg Weiss did not obtain consent from its client. In fact, it would have been unethical for the Hare Wynn and North firms to endeavor to contact a client of Milberg Weiss because they were known to be represented by other counsel.

Additionally, there is evidence before this Court, Blankenship's contract with Milberg Weiss, which indicates that consent was obtained for the joint prosecution of these claims.

Regarding Defendants' argument that the Hare Wynn and North firms violated some duty to the class by overreaching, it is unambiguous from the Orders of Judge Wynn that the total fee

was deemed fair by the Court. The fee split had absolutely no impact on the class's fees and did not harm the class in any respect.

Furthermore, Defendants' position regarding a fee petition by the Hare Wynn and North firms to Judge Wynn is without merit. The Hare Wynn and North firms were not appointed by the Court as settlement class counsel, and they were not served with the May 10, 1999 Order. Judge Wynn approved a total fee for settlement counsel as fair. How Milberg Weiss divided its court-approved fee is not a matter of court approval. Moreover, Judge Wynn's July 10, 1999, Order specifically ordered and authorized court-appointed settlement counsel to allocate their portions of fees to their co-counsel and referring counsel.

d. Prior Representation of MedPartners' Former General Counsel

Moving on from arguments relating to the 1998 MedPartners litigation, Defendants next argue that the Hare Wynn and Somerville firms are conflicted out from this action based upon their prior representation of J. Brooke Johnston, MedPartners' former general counsel. Defendants argue that the duty of J. Brooke Johnston to his former client, MedPartners, extends to the Hare Wynn and Somerville firms due to their representation of Mr. Johnston against MedPartners. The Court finds no support for Defendants argument. MedPartners was never a client of the Hare Wynn or Somerville firms. Other than Alabama Rule of Professional Conduct 1.9(b), Defendants provide no case law which supports their position.

Furthermore, there is no evidence before this Court that Mr. Johnston provided the Hare Wynn or Somerville firms with any confidential information.

Although the issue can be resolved based upon the fact that MedPartners has never been a client of the Hare Wynn or Somerville firms, there is evidence before the Court that any supposed confidentiality has been waived by Defendants. Following the representation of Mr.

Johnston, the Hare Wynn and Somerville firms represented a Ms. Thrasher and a Mr. Berry in actions substantially similar to Mr. Johnston's case. The issues of confidentiality and privilege were never raised by MedPartners during the pendency of those subsequent actions. Therefore, this Court hereby determines that any alleged disqualification against the Hare Wynn and Somerville firms has been waived.

e. Representation of John Lauriello as a Defendant

Defendants contend that proposed class counsel have violated their duties to the current proposed class based on their representation of John Lauriello as a defendant following the intervention of the McArther Intervenors. In support of their position, Defendants rely on Alabama Rule of Professional Conduct 1.7(a), which provides that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) [t]he lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) [e]ach client consents after consultation."

Defendants' argument is MOOT. John Lauriello is no longer a Defendant in this action. Furthermore, the claims against John Lauriello never had any merit, which counsel for Intervenors now admits without any equivocation. Furthermore, the dismissal of John Lauriello was in the best interest of the class.

f. The Lead Counsel Agreement with Lead Counsel for the Intervenors

Defendants further contend that proposed counsel violated their duty to the class by entering into the "Lead Counsel Agreement" with counsel for the Intervenors. Defendants argue that proposed class counsel and Intervenors' counsel breached their duty of loyalty to the proposed class by advocating for the dismissal of John Lauriello.

This Court views the agreement in a completely different light. Not only does the Court find no breach of loyalty, it is this Court's determination that the agreement was in the best interest of the class because it allowed this litigation to move forward.

The Intervenors were not restricted in their activities in any way. Further, the agreement does not provide for a fee split. Given the statement of Lanny Vines, counsel for the Intervenors, at the class certification hearing, it is the Court's determination that had there been evidence of foul play by proposed lead counsel, Mr. Vines would have alerted the Court. In fact, Mr. Vines represented to the Court just the opposite. It was his determination that all discovery and conduct had been accomplished above board and in the best interest of the proposed class.

g. Lawyers As Witnesses

Finally, Defendants argue that the Hare Wynn and North firms should be disqualified as class counsel in this action because they will be necessary witnesses. In support of their position, Defendants rely on Alabama Rule of Professional Conduct 3.7(a), which provides that a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."

First and foremost, this issue is not ripe. Discovery has not been completed, and it would be premature for this Court to declare certain lawyers necessary witnesses at this time.

Without making a final ruling on the issue, it would be illogical in this Court's opinion to declare John W. Haley and J. Timothy Francis "necessary witnesses." They were not settlement counsel when the 1998 MedPartners litigation was resolved. Furthermore, their clients' case had been dismissed and was on appeal before the Alabama Supreme Court when the claims were settled in 1999. It is now clear to all parties that the Court appointed settlement counsel were the real players in the 1999 settlement. It seems that it would be their testimony which would be relevant to the issues before this Court at a possible future trial.

Finally, disqualification of an individual lawyer-witness does not disqualify the entire law firm. It is Defendants' position that every lawyer within the Hare Wynn and North firms should be disqualified because the reputations of the firms are at stake. However, if these firms were concerned with their reputations over the interest of the class, why would they have chosen to file this action knowing full well that adequacy of counsel would be raised by Defendants? Should this issue need to be resolved prior to a future trial, the possible disqualification of an individual lawyer or lawyers will not disqualify the entire law firm.

h. Conclusion Regarding Adequacy of Counsel

Merriam-Webster defines someone as "adequate" when they are "sufficient for a specific requirement." In furtherance of Plaintiffs' counsel's request for appointment as class counsel, Mr. Vines, counsel for the Intervenors, stated during the Class Certification Hearing that the Hare Wynn, North and Somerville firms have "done a stellar, totally first class, world class job in representing the plaintiffs' class." Furthermore, Professor Thomas Morgan, Defendants' expert regarding adequacy of class counsel, testified that the issues raised by Defendants "make [proposed class counsel] less adequate than they would otherwise be and that other lawyers might be." Defendants own expert was unwilling to classify proposed class counsel as "inadequate."

In opposition of proposed class counsel, Defendants have raised every possible roadblock and issue to endeavor to influence this Court to find proposed class counsel inadequate, as such is their duty. In their endeavor to have proposed class counsel disqualified, Defendants know full well that if this Court rules with them on this issue Defendants will have gained a victory without having to adjudicate this case before an Alabama jury.

Litigation is combative, particularly where the damages sought may exceed Three Billion and No/100 ($3,000,000,000.00) Dollars. These plaintiff attorneys have labored thousands of hours since 2003 seeking to represent and protect this proposed class, and have done so without remuneration for their time and monumental expenses incurred. Here, adequacy, not perfection, is the trait that this Court and the Supreme Court are seeking based upon the statute, the case law and Alabama Rule of Civil Procedure 23. This civil action spanning into its tenth year is so complex and replete with filings, depositions and rulings, it is a virtual certainty that no lawyer and/or law firm would now invest the time and incur the expense to represent this class.

Finally, Alabama Rule of Civil Procedure 1 states that "[the] rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action." Given this mandate to apply the Alabama Rule of Civil Procedure 23 justly, it is this Court's considered judgment, as laid out above, that the Hare Wynn, North and Somerville firms are deemed adequate to represent this proposed class.

B. Rule 23(b) Requirements

Having rigorously analyzed and determined that Plaintiffs have met their burden with respect to Rule 23(a), the Court must now determine whether Plaintiffs meet one of the three additional requirements under Rule 23(b). In moving for class certification, Plaintiffs seek certification under Rule 23(b)(1) and/or Rule 23(b)(3).

1. Rule 23(b)(1)

Alabama Rule of Civil Procedure 23(b)(1) provides for certification where:

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

In seeking certification under Rule 23(b)(1), Plaintiffs rely exclusively on the argument that a single legal entity, the 1999 class, was defrauded by Defendants. Based upon this entity theory, Plaintiffs ask this Court to certify this class under Rule 23(b)(1)(A) and (B).

a. Alabama Rule of Civil Procedure 23(b)(1)(A)

As for Plaintiffs' argument concerning Rule 23(b)(1)(A), this Court finds little support for Plaintiffs' position. The Alabama Supreme Court in Funliner of Alabama, L.L.C. v. Pickard held that certification under Rule 23(b)(1)(A) is inappropriate when the only relief sought is money damages. 873 So. 2d 198, 207 (Ala. 2003). It is uncontested that this is exclusively a money damages fraud action. Therefore, Plaintiffs' Motion for Class Certification under Alabama Rule of Civil Procedure 23(b)(1)(A) is hereby DENIED.

b. Alabama Rule of Civil Procedure 23(b)(1)(B)

It is important to note that in the almost nine (9) years since this action was filed not a single party, with their teams of attorneys, has presented this Court with a single case remotely comparable to the facts and allegations as outlined above. Given the unequalled reputations of

the attorneys involved in this matter, it is this Court's conclusion that had there been a substantially similar case to be discovered, it would certainly have been discovered by now. Given this unique factual record, Plaintiffs, while admitting it would be a departure from ordinary practice, have moved for mandatory class certification under Rule 23(b)(1)(B).

Plaintiffs' position is best articulated in their Post-Hearing Brief when they state as follows:

> 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.

Defendants first argue that the issue was not raised in Plaintiffs' motion; therefore, they should be precluded from briefing the issue in their post-hearing brief. It is obvious to the Court from the content of Plaintiffs' motion and brief that Plaintiffs' were seeking certification under Rule 23(b)(1)(A) as well as Rule 23(b)(1)(B). Therefore, the Court will address the substance of Plaintiffs' position.

Concerning the merits of Plaintiffs' Rule 23(b)(1)(B) argument, it is this Court's determination that certification is inappropriate at this time. It is the duty of this Court to apply the laws of this state as interpreted by the Alabama Supreme Court and the Alabama Court of Civil Appeals. In Ex parte Government Employees Insurance Copany, the Alabama Supreme Court rejected certification under Rule 23(b)(1)(B), noting that "[c]lass suits seeking damages exclusively are prime candidates for Rule 23(b)(3) classes." 729 So. 2d 299, 306 (Ala. 1999) (quoting 1. H. Newberg and A. Conte, Newberg on Class Actions, § 4.08 (3d. ed. 1992)) (internal quotations omitted). It is undisputed that this fraud action is exclusively for money

damages. Therefore, this Court cannot certify this case as a mandatory Rule 23(b)(1)(B) class action.

However, given that this is a case of first impression within Alabama and quite possibly the entire United States, this Court would welcome the Supreme Court finding against it and carving out an exception to Rule 23(b)(1)(B) in order to allow this unique factual situation to proceed as a mandatory class action. Until such an opinion is published by the Supreme Court of Alabama, Plaintiffs' Motion for Class Certification under Rule 23(b)(1)(B) is hereby DENIED.

2. Rule 23(b)(3)

Having addressed all ancillary issues, the Court will now address what it considers to be the only legally relevant issue in this case: Can this case be certified as a class action under Alabama Rule of Civil Procedure 23(b)(3)? Before this Court commences its rigorous analysis, it would concede that no fraud certification has been upheld since the enactment of the Alabama Class Action Statutes. However, given the unique nature of this case, it is this Court's determination that it would constitute error to deny Rule 23(b)(3) certification simply because the Alabama Supreme Court has historically denied certification. Therefore, this Court will rigorously analyze the claims presented to determine if they fit within this Court's understanding of Rule 23(b)(3) and the Rules of Alabama Civil Procedure as a whole.

In addressing certification under Rule 23(b)(3), the Alabama Supreme Court in Cheminova America Corp. v. Corker wrote:

> . . . [C]ertification pursuant to Rule 23(b)(3) . . . is appropriate if the Court finds that (1) common questions of fact or law predominate over individual questions, and (2) class treatment of [p]laintiff's claims is superior to other available methods for the fair and efficient adjudication of the controversy . . .
>
> To predominate, common issues must constitute a significant part of individual class members' cases. [Citations omitted.] Where . . .

> common course of conduct has been alleged arising out of a common nucleus of operative facts, common questions predominate . . .
>
> In testing predominance, pursuant to Rule 23(b)(3), as well as testing superiority, the trial court should consider: (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 forums; (D) the difficulties likely to be encountered in the management of a class action. 779 So. 2d 1175, 1182-83 (Ala. 2000).

The key principal, and the only (b)(3) element in dispute, is predominance. There is very little, if any, "interest of members of the class in individually controlling the" litigation. Many class members are relatively small investors who would not have the interest or economic incentive to pursue individual litigation. For those few that choose individual recourse, they may opt out of the class. 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" is obvious. From the uneventful settlement process experience in 1999, it is clear to the Court that any settlement or judgment funds can be efficiently managed and distributed, as can the claims process.

Defendants, in opposition to class certification, have raised two objections: individual reliance and conflicts of law.

a. Predominance of Common Questions of Law Or Fact

The predominance requirement is fulfilled if the common questions of law and fact generally represent a significant aspect of the case and can be resolved for all class members in a single adjudication. See 7A Charles A. Wright, Arthur A. Miller & Mary K. Kane, Federal

Practice & Procedure § 1778, at 528 (2d ed. 1986). Furthermore, the common questions need not be dispositive of the action. Id.

In ruling on a motion for class certification, the trial court is required to conduct a rigorous analysis of both the claims and defenses to determine whether individual questions predominate over class issues. Ex parte Equity Nat. Life Ins. Co., 715 So. 2d 192 (Ala. 1997).

Historically, the Alabama Supreme Court has held that class certification of a fraud claim is inappropriate because issues of individual reliance, an element of the claim, predominate over all other common questions of law and fact. However, the matter presently before the Court – a class action about a class action – can be distinguished from every case cited by the Defendants.

It was stated by Plaintiffs' Rule 23 expert, Professor William B. Rubenstein, that "class actions are agency-driven, the key legal principles that apply to this fraud case are those of agency law." (Declaration of Prof. William B. Rubenstein) "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].' Consequently, the plaintiffs' class in the instant case had a legal status and interest separate from the interest asserted by [the named representative]." Corbitt v. Mangum, 523 So. 2d 348, 351 (Ala. 1988). Therefore, in considering whether individual questions predominate, it is imperative that all claims and defenses be examined based upon the principal/agent relationship which existed between the 1999 Settlement Class – a quasi entity – and appointed class counsel.

b. Conflicts of Law

In opposition to class certification, Defendants argue that "[t]he proposed nationwide class . . . fails to satisfy the predominance requirement of Rule 23(b)(3) because the Court would

be required to apply differing and conflicting laws from differing states to adjudicate the claims.

In response, Plaintiffs assert and the Court agrees that the issue is untimely. Under Alabama Rule of Civil Procedure 44.1, "[a] party who intends to raise an issue concerning the law of another state . . . shall give notice by pleadings or other reasonable notice." It has been almost nine years since this action was filed, and now is the first time Defendants have brought the issue before the Court. Furthermore, Defendants have consistently argued the application of Alabama law throughout these many years. Therefore, it is this Court's determination that the choice of law issue has been untimely raised. Nevertheless, the Court, in an abundance of caution, will address Defendants' argument regarding conflicts of law.

Had the issue been timely raised, the merits of the case dictate that Alabama law should govern. "Alabama applies the rule of *lex loci delicti*, which means that Alabama courts apply the law of the state where the injury occurred." Glass v. Southern Wrecker Sales, 990 F. Supp. 1344, 1348 (M.D. Ala. 1998). "[I]t 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." Id. In the matter presently before the Court, 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 on July 10, 1999.

Furthermore, the parties, including the AIG Defendants, agreed in 1999 that the "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." Accordingly, it is this Court's determination that the 1999 Stipulation, 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," encompasses this fraud-in-the-settlement action.

In conclusion, this Court finds that Alabama law applies to every class members' claims. Therefore, "questions of law . . . common to the members of the class predominate over any questions affecting only individual members." For these reasons, class certification will not be denied based upon Defendants' choice of law argument.

c. Elements of the Claims

When considering whether common issues predominate, the trial court is also to consider each element of the claims upon which Plaintiffs seek certification and the defenses thereto. Accordingly, each claim and the defenses thereto are discussed below.

Plaintiffs' fraudulent suppression and fraudulent misrepresentation claims are based upon the alleged misrepresentation and/or concealment by Defendants of the insurance limits available during the pendency of the underlying 1998 MedPartners security litigation. The elements of a claim for suppression are (i) failure to disclose a material fact, (ii) a duty to disclose such fact, (iii) defendant's knowledge of such fact, (iv) reliance by plaintiffs, and (v) resulting damage. Ex parte Household Retail Services, Inc. 744 So. 2d 871 (Ala. 1999). The elements of a claim for misrepresentation are (i) a false representation, (ii) of a material existing fact, (iii) reliance by plaintiffs, and (iv) resulting damages. Alabama Psychiatric Services, P.C. v. 412 South Court Street, L.L.C., 81 So. 3d 1239, 1247 (Ala. 2011). Defendants contend that the fraud claims should not be certified because individual issues predominate as to each individual class members' reliance, and their statute of limitations defense.

d. Individual Reliance

Defendants contend that they "are entitled to determine each individual class member's level of knowledge and awareness of the . . . insurance coverage as part of the assessment regarding each class member's claim, including whether each individual class member's reliance on any alleged misrepresentation or suppression was reasonable." (Defs' Post-Hearing Brief p. 11). If this were a conventional fraud class action where a group of individuals were individually defrauded, Defendants would be correct in their position that individual issues predominate. However, this is not a case involving a group of individuals who were individually defrauded. This instead is a case involving fraud upon a certified class.

Given the quasi entity nature of a certified class, it is this Court's determination that individual reliance is not an element of this fraud-in-the-class-settlement case. This case is most appropriately analyzed by applying entity law to the facts before the Court. In the case of fraud on a corporation, one would not have to show individual reliance by each and every shareholder. Such a case would be proven through evidence of fraud on the agent of the corporation. In the matter presently before the Court, Defendants were dealing exclusively with settlement counsel and the Court when the alleged misconduct occurred. The Court appointed agents of the 1999 settlement class are those who were defrauded. Therefore, the evidence necessary to establish reliance can only be obtained from the 1999 settlement class's agents – class counsel.

In an effort to refute Plaintiffs' agency argument, Defendants utilize the general agency proposition that a principal cannot rely on its agent when the principal knew the true facts. While this position may be correct when dealing with individual principals, it has been rejected when applying agency law to entities with large numbers of principals/members. Because the 1999 Settlement Class is an entity, it is this Court's determination that individual knowledge and

reliance is irrelevant. The only knowledge and reliance relevant to the case before this Court are the knowledge and reliance of the agents of the 1999 Settlement Class – Class Counsel. For the preceding reasons, individual knowledge and reliance will not defeat class certification because individual knowledge and reliance are irrelevant to the case before this Court.

e. Statute of Limitations Defense

In a final effort to prevent class certification, Defendants argue, without providing any evidence and/or testimony, that individual issues regarding their statute of limitation defense predominate over common issues. This Court will not preclude certification based upon a hypothetical conflict regarding an affirmative defense. Additionally, this Court is uncompromisingly skeptical Defendants could have demonstrated that individual issues would predominate had they decided to seek the testimony from the individual members of the 1999 Settlement Class.

III. CONCLUSION

Unique is the word which has been used over and over again by all of the lawyers and the Court in describing this case. Upon random assignment of this civil action in 2003, this Court made extensive efforts to locate a case on point. Beginning with the earliest hearings, this Court inquired whether counsel had successfully located a similar decision. This Court has become accustomed to attorneys shaking their heads and remarking in the negative.

Over the years as each of my law clerks have embarked on their legal careers, I would instruct the incoming law clerk to locate a case on point. On every occasion, the response was that this case is unprecedented, one of a kind . . . UNIQUE. Furthermore, the record will reveal that during the five (5) day Class Certification Hearing reference was repeatedly made to the uncommonness of this case.

Lawyers, and most certainly, judges, prefer the luxury of a case on point. In the law, we are uncomfortable with precedent setting, one of a kind, unique, first impression cases. However, such is the situation that is before this Court. Therefore, the attorneys, this Court and the Alabama Supreme Court must blaze a new trail so that this case can be labeled by future attorneys and courts as "on point."

With this reality comes added responsibility for the court system to get it right, lest we mislead attorneys, the public and courts that follow.

This case has been active longer than any I have handled. It is undoubtedly the most complex.

In performing my rigorous analysis, I have harkened back to the commencement of this litigation, and more critically, to the events leading up to certification by Judge Wynn in July of 1999. For it is during that time frame, over a decade ago, that this Court must direct its rigorous analysis. Most of the lawyers who prosecuted and defended that particular case, and the Circuit Judge who certified it, are long absent from this process. Given this lack of time proximity, we all must do our best to understand what took place in the second half of the 1990's, without having experienced such. In fact, no lawyer who was a signatory to the 1999 class is participating here. Much has transpired since the offices of MedPartners (now Caremark) made certain decisions that constitute the subject of this decision.

This Court has endeavored to explore and analyze every argument and issue throughout these many years. Counsel have represented their clients' interests to the fullest. Furthermore, counsel have comprehensively challenged this Judge through their briefing and poignant oral arguments.

I drafted these conclusory remarks taking all aspects of this unique case into account. Following my rigorous analysis, I am confident in my decision to certify this class action as to the allegations of misrepresentation and suppression. The Plaintiffs are owed their day in court and the opportunity to present their claims to a jury in the form of a class action, as it was the class which was allegedly defrauded during the events giving rise to the settlement and ultimate certification in July of 1999.

In conclusion, it is this Court's considered determination that the requisite criteria Rule 23 of the Alabama Rules of Civil Procedure and Section 6-5-641 of the Code of Alabama have been met. This Court is firmly convinced that all issues should be litigated as a class action.

Therefore, it is this Court's decision, in accordance with the findings above, to ORDER, ADJUDGE, and DECREE that Plaintiffs' Motion for Class Certification be and the same is hereby GRANTED. The Court certifies the following class:

> 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; or (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"); excluding all those members who opted out of the 1999 Class Settlement.

The Court hereby appoints JAMES O. FINNEY, JR., SAM JOHNSON, and CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM as representatives of the above certified class. The Court also appoints the following firms as class counsel: Hare, Wynn, Newell & Newton; North & Associates; and Somerville, LLC.

It is further ordered that a Proposed Notice of Class Action be submitted to the Court within fifty (50) days of this Order.

DONE and ORDERED this the 15th day of August, 2012.

Tom King, Jr.
Circuit Judge