Appeal No. 1120010

IN THE SUPREME COURT OF ALABAMA

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

Defendants-Appellants-Cross Appellees,

v.

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

Plaintiffs-Appellees-Cross Appellants.

Appeal of Order Certifying Class Action from the Circuit Court of Jefferson County, Alabama, Case No. CV 03-6630-TK

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves an unprecedented attempt by the trial court to expand the use of Rule 23, Ala. R. Civ. P., far beyond the parameters this Court has carefully and consistently set. Appellants request oral argument to assist this Court with its decision in light of the number and complexity of the issues in this appeal and the implications of the trial court's ruling.

TABLE OF CONTENTS

Page

Page

Page

Page

STATEMENT OF JURISDICTION

This appeal of an order of the Circuit Court of Jefferson County certifying a class is brought pursuant to Ala. Code §6-5-642, which provides that "[a] court's order certifying a class or refusing to certify a class action shall be appealable in the same manner as a final order."

FORM OF RECORD CITATIONS

Citations to the Clerk's Record are of the form "Cxx." Citations to the Transcript of the Class Certification Hearing (May 30 to June 4, 2012) are of the form "Rxx." Citations to the Record on Appeal in Appeal No. 1070513, incorporated into the current Record pursuant to this Court's May 29, 2013 Order, are of the form "CAxx." Citations to the Supplemental Record on Appeal are of the form "Sxx," with page numbering from the Clerk's numbers at the top of each page, not the similar (but not identical) numbers at the bottom. Plaintiffs' Exhibit 43 is a disk in the Clerk's Record containing all deposition transcripts and exhibits from the class discovery period. Citations to transcripts on this disk are of the form "D(Deponent)xx"; citations to exhibits on this disk are of the form "E (Exhibit Number)xx."

To assist the Court in navigating the record, citations will, on occasion, include references both to Defendants' Post-Hearing Proposed Findings of Fact and to the evidentiary support in the record for the finding(s) and, ultimately, the factual assertions in this brief. Where that is done, the citation form will be: "Cxx (Cyy, Czz)," which indicates a proposed finding at page Cxx of the record that is supported by the evidentiary materials at Cyy and Czz.

Because all exhibits offered by all parties were accepted into evidence, citation to exhibits is by record page only, without citation to where offered and admitted.

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Regulations

Rules

STATEMENT OF THE CASE

In early 1998, after publicity surrounding a failed merger, several securities fraud class actions were filed against MedPartners in Alabama state and federal courts (the "1998 Litigation"). On January 15, 1999, about a month after MedPartners issued a press release trumpeting that it had acquired new excess insurance coverage and that the insurer had assumed financial responsibility for the defense and ultimate resolution of that securities litigation, the parties to the 1998 Litigation, and MedPartners' insurers, signed a Memorandum of Understanding in which they agreed to settle all of the pending cases for $65M, a then-record securities litigation settlement in Alabama.

More than four years after that settlement was approved, John Lauriello, a named plaintiff in one of the 1998 cases, filed this class action attacking the prior settlement as insufficient. Specifically, he alleged that MedPartners (by then known as Caremark Rx, Inc.) and its insurers had lied about the excess coverage and kept the 1998 plaintiffs' lawyers from learning that it even existed. Two of the three law firms that filed the current lawsuit also represented Mr. Lauriello in the 1998 Litigation and had sought to represent the entire class in that litigation.

The Defendants have steadfastly denied the material allegations in the complaint, contending, among other things: (1) that the alleged fraud claims are barred by the statute of limitations in light of the repeated public disclosures relating to the excess insurance coverage; and (2) that plaintiffs' counsel in the 1998 Litigation knew or reasonably should have known about the excess insurance coverage, given that the public disclosures, which were made <u>before</u> the settlement was approved, were exactly the types of documents monitored by counsel pursuing securities claims.

Discovery has confirmed that: (1) the files of the lawyers principally involved in settling plaintiffs' claims in the 1998 Litigation contained the December 1998 press release disclosing MedPartners' purchase of the excess insurance coverage, as well as correspondence with other lawyers specifically discussing both the existence and extent of that excess coverage; and (2) all MedPartners' shareholders of record were sent the Company's 1998 10-K in April 1999, which prominently disclosed the excess coverage.

These undisputed facts call into question whether there is any claim to be tried here at all. For class certification purposes, they mean that the critical issues to be tried necessarily will include what each putative class member and each lawyer who represented or sought to represent the class in 1998 knew or should have known about these public disclosures; when they knew or should have known it; and what they did or should have done upon getting the information. Even Plaintiffs' experts concede this. The trial court's failure to rigorously analyze the true nature of the claims and defenses being asserted has resulted in entry of an Order that wrongfully certifies a class and erroneously finds that the lawyers seeking to represent that class can adequately do so given the known facts.

On October 20, 2006, this Court reversed the original certification of a class in this case, holding that the trial court had erred by (a) treating the class in this case as already certified in the underlying securities cases and (b) by failing to conduct "the 'rigorous analysis' contemplated by Rule 23, Ala.R.Civ.P., and by §6-5-641, Ala.Code 1975.... [of] the members of the purported class ... in terms of their relationship to the particular claims and defenses to be certified in the class action." Ex parte Caremark, Rx, Inc., 956 So.2d 1117, 1125 (Ala. 2006). The case was remanded to the trial court with a mandate to conduct the requisite rigorous analysis.

Now, more than six years later, the trial court has repeated and magnified its previous errors. Its decision repeatedly intones the phrase "rigorous analysis,"[1] but the trial court failed to do as directed. It once again treated the 1999 class as the only thing that mattered, going so far as to hold the claims of the individual class members "irrelevant" (C5774-75). It wholly ignored this Court's admonition to assess the "claims **and defenses**" to be certified, brushing past the overwhelming individual issues of reliance that swamp any common questions and dismissing as "hypothetical" the statute of limitations issue that has been in this case from day one (C5775). It also swept aside serious issues concerning the conduct of plaintiffs' counsel in the underlying litigation, including counsel seeking to represent the class here, and it put off to another day determining whether these lawyers will be neces-

[1] C5745, 5746, 5752, 5766, 5769 (twice), 5771, 5776 (twice), 5777.

sary witnesses **<u>against</u>** the class at trial. It ignored that many members of the class it was certifying never filed a claim in 1999 and so cannot have a claim now. As a result, the claims to be tried here still have not been "rigorously analyzed" as required by Alabama law.

Plaintiffs say that the excess insurance policy (the "AISLIC Policy") was written without a limit of liability and that, had the true information been known, the 1998 securities actions would have settled for more than they did. Faced with the press release, the 10-K, and the three other public disclosures prior to approval of the settlement, Plaintiffs complain that the documents did not say in exactly these words that the Policy had no liability limit. But the press release expressly recited that the insurer would "assume financial responsibility for the defense and ultimate resolution of the securities litigation," so that "this litigation presents no material adverse financial risk" to MedPartners. In other words, the insurer was now liable – without limitation – for <u>any</u> settlement or judgment.

Moreover, **<u>discovery has confirmed that plaintiffs' counsel involved in settling the action – Bill Lerach, Neil</u>**

<u>Selinger, and Gene Cauley - had the press release and knew about the excess insurance</u>. Discovery has also shown that other plaintiffs' lawyers wrote the settling lawyers to say that the press release means exactly what the Defendants have argued all along. Tellingly, at no time after reviewing the press release or the correspondence from the other lawyers did Lerach, Cauley, or Selinger seek to re-negotiate the amount of the eye-popping settlement. Instead, their efforts focused exclusively on reaching an agreement as to how to split up the $18M in attorneys' fees.

It will be part of Defendants' case on the merits that the December 1998 press release and the other similar disclosures do not merely prevent any tolling of the statute of limitations but conclusively negate the existence of fraud and suppression. It will further be part of Defendants' case that the $65M underlying settlement was generous to the class and that all of the plaintiffs' lawyers in 1999 - including those now seeking to represent this putative class - were principally concerned about getting their shares of the huge fees approved as part of the settlement.

The trial court took none of this into account. Instead, the decision below has the aura of reasoning backward from a pre-ordained result. While nominally recognizing its role on class certification was solely to identify and understand factual issues, not to adjudicate them, the trial court nevertheless (a) ruled on the basis of its personal disbelief in Defendants' theory of the case (C5758-59); and (b) conclusively determined it to have been "in the best interest of the class" that class counsel spent two years defending plaintiff Lauriello **against** damages claims brought by the very class they were seeking to represent (C5763). And, despite this Court's insistence that the claims asserted by the intervenor plaintiffs, including claims filed against Mr. Lauriello, receive an independent airing (956 So.2d at 1128), the trial court sanctioned an agreement in which the intervenors withdrew these claims in exchange for their lawyer being cut in on any fee award.

Because these rulings will make it impossible for Defendants to fairly present their case, and for all the reasons set forth below, the latest order granting certification should be reversed.

Plaintiffs' Allegations

The cases constituting the 1998 Litigation alleged that MedPartners had made misleading public statements and disclosures concerning the Company's financial condition (CA25-26 ¶¶26-27). The settlement of the 1998 Litigation was approved on July 10, 1999. This action, attacking that settlement as insufficient, was filed on October 22, 2003 (CA17).[2]

The 1998 Litigation ultimately settled for $65M (R644; S1655). The total settlement, which was negotiated between plaintiff lawyer Bill Lerach[3] and counsel for the insurer (R595-96, 758), included $9M Lerach unilaterally allocated to a separate, non-class securities lawsuit called Blankenship, in which he represented the plaintiffs (R771-72, S1417-19, 2233-34). Even though they had no role in the case, two of the three firms representing the now-certified class here shared in Lerach's Blankenship fee (R650-51).

[2] The currently operative pleading, the Fourth Amended Class Action Complaint, "adopted and incorporated" "[a]ll allegations and averments" in Plaintiffs' other complaints previously filed in this action.

[3] In 2008-2009, Lerach served 16 months in federal prison for lying to courts that were approving class action settlements (S2846 ¶8). See Dillon & Cannon, Circle of Greed 461, 466 (2010).

Plaintiffs' counsel proffering the overall settlement to Judge Wynn in 1999 told him that he did not have to concern himself with the Blankenship settlement (S1417-19).

The Complaint here alleges two counts: (1) that Defendants misrepresented the amount of insurance available to settle the 1998 Litigation (CA1006-07 ¶¶79-82), and (2) that Defendants suppressed the existence of the AISLIC Policy (CA1007-08 ¶¶83-86). The Complaint does not identify a specific representation made by or to a specific person, let alone one that any Plaintiff here reviewed or relied on. Rather, plaintiffs assert that counsel for Defendants told counsel for the 1998 plaintiffs that the amount of available insurance was $50M — a statement that all now agree was true when made. In Count II, the Complaint alleges that Defendants failed to disclose the existence and terms of the AISLIC policy to the 1998 plaintiffs and the Court, and that the plaintiffs in that litigation did not discover, and could not have discovered, the alleged non-disclosure until September 2003 (CA1004-06 ¶¶73-74, 78). Plaintiffs seek an award of damages equal to the difference between $56M and "what would the case have probably settled for in 1999 if the truth had been known about the unlimited insurance policy" (R114).

Defendants' Motion to Dismiss

In early 2004, Defendants moved to dismiss the case as barred, inter alia, by the two-year statute of limitations, Ala.Code §§6-2-3, 6-2-38(l). Central to the motion were the public disclosures MedPartners had made of the excess insurance in 1998 and 1999 — disclosures in which, as noted above, MedPartners announced to the world that its insurer had assumed financial responsibility for the defense and ultimate resolution of the 1998 Litigation and that, as a result, the litigation no longer posed a material adverse risk to MedPartners. On July 23, 2004, the trial court denied the motion without prejudice to re-asserting the limitations defense later (CA1015-17).

Plaintiffs' First Class Certification Motion

In August 2004, Plaintiffs filed a 6-page "Motion to Appoint John Lauriello as Class Representative and to Appoint Lead Class Counsel," arguing that there was no need to engage in any "rigorous analysis" of the alleged claims because the class had already been certified in the 1998 Litigation. The trial court granted that motion, holding that "[t]his case shall proceed as a class action on behalf of the Class already certified in the '1998 MedPartners Securities Litigation'" (CA1362). The Defendants sought review by this Court.

The Intervention

On November 5, 2003, two weeks after Lauriello filed his Complaint, Frank McArthur and others filed a second putative class action, purportedly on behalf of the same class that Lauriello sought to represent (S39-60). Their allegations were substantially similar to Lauriello's, but they also alleged fraud and negligence against certain plaintiffs' and defense counsel in the 1998 Litigation (S43-51 ¶¶5, 8, 12-21, 29). After Judge Vowell stayed the McArthur action under the "first-filed rule," the McArthur plaintiffs moved to intervene in this case. The Intervenors asserted that lawyers involved in representing the plaintiffs in the 1998 Litigation had a conflict of interest with the present class and that Lauriello's lawyers thus could not adequately represent the class here (CA1391-94, 1401-39, 1447-48). The proposed Complaint in Intervention included claims against the Defendants in this case, against a number of the lawyers involved in the underlying litigation, and against John Lauriello because of his status in the 1998 Litigation. The trial court denied the Motion to Intervene as untimely (CA1999), and Intervenors appealed to this Court.

This Court's 2006 Decision

On October 20, 2006, this Court vacated the class certification order and directed that the Circuit Court perform a rigorous analysis of Plaintiffs' alleged misrepresentation and suppression claims – "claims that have not heretofore been analyzed for class treatment." Ex parte Caremark, 956 So.2d at 1126. This Court agreed that "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," but it held that a rigorous analysis was nevertheless required, because "more than a discrete and identifiable group of individuals is required to properly certify claims for class treatment." Id. at 1125. The required "rigorous analysis," this Court held, was of "the members of the purported class ... in terms of their relationship to the particular claims and defenses to be asserted in the class action." Id.

This Court also reversed the denial of the Motion to Intervene, holding that the Intervenors' presence was required to ensure a proper vetting of their allegations that "Lauriello and his counsel have a conflict of interest and are not appropriate parties to represent the class," and that "Lauriello and his counsel are alleged to have, at a minimum, acted negligently in not discovering the fraud." Id. at 1128. Absent intervention, this Court held, "McArthur's interests, as well as the interests of the other purported class members, may not be adequately protected," and "justice may not be attained." Id. at 1129.

The Motions to Dismiss in McArthur Following Remand

On remand from this Court's 2006 decision, the lawyers who had been sued by the McArthur plaintiffs moved to dismiss the claims against them as time-barred under the Alabama Legal Services Liability Act. The trial court granted the motion (CA3360-61), and this Court affirmed (C60).

McArthur, however, had also sued John Lauriello personally. When Lauriello moved to dismiss, the trial court denied the motion (CA3624-26), and Lauriello thus remained a defendant in the action. For the entire two years Lauriello was a defendant to claims brought by the same putative class that has now been certified, he was represented against the class by the same lawyers who have now been certified as lawyers for the class.

McArthur Withdraws His Conflict Allegations in Exchange for a Share of Any Attorneys' Fees

In early 2009, the battle between the Lauriello and McArthur factions intensified. On January 30, the Lauriello Plaintiffs moved to disqualify McArthur's counsel. On February 4, McArthur filed a motion to disqualify Lauriello's counsel (the counsel who have now been certified as class counsel). McArthur asserted that Lauriello's counsel had "wholly failed in their legal responsibilities and duties" (C744) in 1998 and 1999 and that "neither Lauriello nor his attorneys are fit or qualified to represent the putative class in any capacity" (C734).

Less than one month later, all this was as if it had never happened. The Lauriello lawyers entered into a "Lead Counsel Agreement" with McArthur's lawyer (S1319-26), pursuant to which all disqualification motions were withdrawn and McArthur's counsel agreed not to seek to become class counsel. In exchange, the Lauriello lawyers agreed not to object to McArthur's counsel's receiving up to 7.5% of any attorneys' fees. Although not set forth in the written agreement, it is undisputed that part of the quid pro quo was that McArthur would dismiss his claims against Lauriello with prejudice and without any compensation to the putative class (R827-28, 985-86; D(Vines)192, 201).

Class Discovery and the Class Hearing

Class discovery commenced after the trial court entered a class scheduling order (C1222-24). Among the 24 depositions taken were those of (a) the lawyers seeking to represent the class in the current action and (b) two members of the 1998 plaintiffs' settlement triumvirate: Gene Cauley, who was deposed for two days in federal prison in Colorado, where he is serving a 7-year sentence for stealing money from classes he had represented (C3803-97, C3895), and Bill Lerach, who was deposed following his release from federal prison. The third triumvir, Neil Selinger, died before he could be deposed (C5721).

At the class hearing, the court received both live and deposition testimony and numerous exhibits. The parties submitted pre- and post-hearing briefs, and Defendants submitted over 500 proposed findings of fact meticulously tied to the evidentiary record (C5634-5738).

The Ruling Appealed From

On August 15, 2012, the trial court issued its Order on Plaintiffs' Motion for Class Certification, denying the motion under Rules 23(b)(1)(A) and 23(b)(1)(B)[4] but granting it under Rule 23(b)(3). The court certified 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. (C5777)

[4] The court's Rule 23(b)(1)(A)&(B) rulings are the subject of Plaintiffs' cross appeal in this case.

The court appointed James O. Finney, Jr., Sam Johnson, and City of Birmingham Retirement and Relief System as class representatives[5] and appointed Hare, Wynn, Newell & Newton, North & Associates, and Somerville, LLC as class counsel.

Numerosity (Rule 23(a)(1)) and commonality (23(a)(2)) were undisputed (C5753-54). The claims of the proposed class representatives were held to be typical of those of the class (23(a)(3)), and the named plaintiffs were held to adequately represent the class (23(a)(4)), notwithstanding that almost half the underlying settlement had gone to holders of securities markedly different from the common stock purchased by the plaintiffs here. The trial court did not address Defendants' showing that the holders of different classes of securities had different claims and incentives in this action (see S408-11), merely holding that "any conflicts between the subclasses were resolved in the 1999 class settlement" (C5755-56). The court similarly failed to address Defendants' argument that persons who did not submit claims in the underlying settlement had no claims here and could not be part of a class.

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[5] Plaintiffs dropped John Lauriello as a proposed class representative around the time of his dismissal as a Defendant (C1241).

The trial court rejected Defendants' argument that Class Counsel could not adequately represent the class under Rule 23(a)(4) because of both their involvement in the 1998 Litigation and their conduct in this case. It held that (i) whether counsel were necessary witnesses adverse to the class was "not ripe" (C5764); (ii) their conduct during 1998 and 1999 – including their failure to investigate the proposed settlement, their fee-sharing agreement with lead settlement counsel, and their fee sharing with a client – did not violate either their duties to the 1999 class (C5758-59) or the Alabama Rules of Professional Conduct (C5760-62), and Defendants were estopped from criticizing that conduct in any event (C5759); and (iii) neither their representation in this action of a client being sued by the Intervenors on behalf the very class that counsel sought to represent, nor their agreement to pay Intervenors' counsel up to 7.5% of any fee recovery in exchange for his agreeing to forgo his attacks on them and dismiss the claims causing the conflict, has any relevance to whether they can serve as class counsel (C5763-64).[6]

[6] The court also held that the Hare Wynn and Somerville Firms' prior representation of MedPartners' former General

Footnote continued on next page.

Turning to Rule 23(b)(3), the court concluded that questions of "individual knowledge and reliance [are] irrelevant" to the fraud claims here (and, thus, individual issues did not predominate), because the claims are being brought on behalf of the former class as an entity, not on behalf of the individual class members (C5774-75). It also rejected as a "hypothetical conflict regarding an affirmative defense" (C5775) Defendants' argument that each class member's state of knowledge regarding the excess insurance had to be examined separately to determine whether the statute of limitations – which, on its face, has run as to the entire class – had been tolled as to that class member. Finally, the court rejected as untimely Defendants' argument that individualized issues would predominate due to the applicability of multiple states' fraud law (C5772) and concluded that Alabama law would apply to every class member's claims in any event (C5772-73).

This appeal followed.

Footnote continued from previous page.

Counsel did not disqualify them from acting as counsel here (C5762-63). That ruling, while erroneous and contrary to Alabama law, is not at issue on this appeal.

STATEMENT OF THE ISSUES

(1) Whether the trial court erred in certifying a nationwide fraud class under Rule 23(b)(3) where there are material variations in (i) the extent to which individual class members knew or should have known of the excess insurance policy, (ii) the individual class members' degree of reliance on any misrepresentation or suppression regarding the excess insurance policy, and (iii) the state laws applicable to the individual class members' claims?

(2) Whether the trial court erred in certifying a Rule 23(b)(3) class when the tolling of the statute of limitations as to each class member, if available at all, depends on that class member's individual knowledge and understanding of the public disclosures concerning the excess insurance policy?

(3) Whether the trial court erred in appointing as class counsel lawyers who must give testimony adverse to the class at trial?

(4) Whether the trial court erred in appointing as class counsel lawyers whose conduct, both in the 1998 Litigation and in this action, irrevocably compromises their ability to discharge their fiduciary duties to this class?

(5) Whether the trial court erred in certifying a class that includes (a) individuals who purchased materially different securities from those bought by the named plaintiffs here and (b) individuals who never even submitted a claim in the underlying action?

STATEMENT OF THE FACTS

The 1998 Litigation

Lauriello I and the Joint Prosecution Agreement Between Hare Wynn/North and Milberg

On January 9, 1998, Hare Wynn filed a class action complaint in the Circuit Court of Jefferson County ("Lauriello I") on behalf of John Lauriello and a putative class of purchasers of MedPartners' securities (S1488-1506). Within a few days, the North firm joined as co-counsel (S2919-20).

Shortly thereafter, Hare Wynn and North entered into a Joint Prosecution Agreement (the "JPA") with Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg") to "jointly manage and supervise" Lauriello I and any other action any of the firms might bring relating to MedPartners (S2236-38; R589-90, 699-700). The firms agreed to pool all legal fees earned in any MedPartners Litigation and divide them 60% to Milberg and 40% to Hare Wynn/North (S2236-37 ¶2; R591). No commitments were to be made or material steps taken in any of the cases without the agreement of all three firms, and no other MedPartners lawsuits, whether individual or class actions, could be filed without the consent of all three firms (S2236 ¶1; R590-91, 700).

Defendants in Lauriello I moved to dismiss (S2922-24, 2926-27), and Milberg took the lead in responding, handling most of the briefing and all of the court appearances (R591, 702-03; S683-84). The motion to dismiss was granted (S1645-47), and Plaintiffs appealed to this Court (S2930-33), with Milberg once again taking the lead (R592-93, 707-08). The Lauriello I appeal was still pending when the 1998 Litigation settled and it was included in the settlement (R708).

The Other State and Federal Class Actions

In addition to Lauriello I, the 1998 Litigation included 18 other state and federal class actions and one derivative action (S1511-19), which fell into at least two groups. Purchasers of MedPartners common stock and options asserted fraud-based claims under the Securities and Exchange Act of 1934 over a 15-month period prior to MedPartners' aborted merger with PhyCor (e.g., S3202-42, 3244-68, 3270-87), whereas purchasers of MedPartners' Threshold Appreciation Price Securities ("TAPS") claimed under the Securities Act of 1933 – which does not require fraudulent intent – for alleged misstatements and omissions in the TAPS offering documents (e.g., S3377-3402, 3404-15).[7]

Each of the cases had been brought by a different set of lawyers. By the time the actions settled, the shifting alliances among the various plaintiffs' firms had coalesced somewhat. Lead counsel for the common stock/option plaintiffs were New York lawyers Neil Selinger and Roger Kirby, and lead counsel for the state TAPS plaintiffs was Arkansas lawyer Gene Cauley.[8] Milberg's Bill Lerach represented the Tender Offer plaintiffs, but his principal role was as the lead settlement negotiator on behalf of all plaintiffs.

Milberg's Blankenship Case

In September 1998, Lerach and Milberg filed a private, non-class action against MedPartners ("Blankenship" (S2943-61)) on behalf a group of Florida doctors who had sold their practices to MedPartners. Milberg and the referring

[7] Almost all of these actions were in Alabama state or federal courts. There was also a suit against MedPartners in California federal court (the "Padilla" action), brought by Milberg before Lauriello I was filed, alleging violations of the federal tender offer laws.

[8] The federal TAPS plaintiffs were represented by New York lawyers Steven Toll and Lee Squitieri.

Florida lawyer signed a representation agreement with the Blankenship plaintiffs (S2967-87). The Hare Wynn and North firms had nothing to do with Blankenship (R651, 796), were not parties to the representation agreement (R845), and did not even know the case existed until after it was settled (R651-52, D(Francis)81-83).

The AISLIC Policy and the Public Disclosures

On October 22, 1998, while the 1998 Litigation was pending, MedPartners purchased the AISLIC Policy from an affiliate of an existing insurer, National Union, for a $22.5M premium. Between December 1998 and the May 1999 preliminary settlement approval hearing, MedPartners publicly disclosed the existence and impact of the AISLIC Policy at least five times.

The December 1998 Press Release

MedPartners first disclosed its purchase of the excess insurance policy in a December 17, 1998 press release:

> 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 lia-**

> **bility of this body of litigation behind us** and move forward **knowing that this litigation presents no material adverse financial risk to the company**" (S1800 (emphasis added)).

As Plaintiffs' expert conceded, "no material risk" is "unusual" language and told readers that, after buying the excess policy, MedPartners did not predict **any** exposure, under **any** circumstances, associated with the 1998 Litigation (R419-20).

The MedPartners 1998 10-K Is Mailed to All Current Shareholders

On April 15, 1999, MedPartners filed with the SEC its 1998 Annual Report on Form 10-K (S1885-2146). The 10-K was available to the public upon filing. 17 C.F.R. §§232.101, 250.104(a) (1998). MedPartners' 10-K reported:

> In addition [to its regular D&O insurance], in December 1998, the Company agreed to pay a premium of $22.5 million to acquire excess equity protection insurance coverage from National Union Fire Insurance Company of Pittsburgh ("National Union"), pursuant to which National Union assumed financial responsibility for the defense and ultimate resolution of the Shareholder Litigation. (S1894; see S1897)

The 10-K further told investors that, as a result of this new insurance, "management believes that the ultimate resolution of those matters presents no material adverse risk to the Company" (S1897).

MedPartners' 1998 10-K was mailed to each then-current MedPartners shareholder in late April 1999 (S3929-30) - before Judge Wynn gave preliminary approval to the settlement and ordered that notice of class certification and settlement be mailed to all shareholders.

Additional Public Information About the Excess Policy

That the Policy existed - and that the insurer had assumed responsibility for the securities litigation, so that the litigation no longer presented any material risk to MedPartners - was the subject of additional public disclosure and discussion in the months between the December 1998 press release and the time the settlement was approved. On December 28, 1998, for example, the Birmingham Business Journal reported that "MedPartners also announced that it had entered into an excess insurance agreement with National Union Fire Insurance Company of Pittsburgh, in which National Union will assume responsibility for the defense and ultimate resolution of the securities litigation filed on behalf of certain buyers of MedPartners' common stock" (S2214; see D(Lauriello)125-28), and on January 15, 1999, MedPartners made a public SEC filing that disclosed it had given a copy of the excess policy to its lenders (S1826-

27). A February 10, 1999 press release said, in part, that MedPartners had "negotiated additional insurance coverage that ensures protection going forward from any material adverse financial risk associated with pending shareholder litigation" (S1870-74). That press release was attached to an April 1, 1999 SEC filing (S1877-83).

Not only was the AISLIC Policy - and its attendant elimination of any risk to MedPartners from the ongoing securities litigation - a matter of general public knowledge, but plaintiffs' lawyers in the 1998 Litigation had actual knowledge of it. In fact, the AISLIC Policy was investigated and debated among counsel. Cauley had a copy of the December 17, 1998 press release (S1759-61, 538), and his copy of the February 10, 1999 press release had the information regarding the excess insurance bracketed and underlined (S1872, 540-42). On March 8, 1999, he faxed his copies to Lerach's partner Keith Park - with the underlining and bracketing of the insurance disclosures (S2295-2319). Nor was that the first time Lerach's firm had gotten the information: Milberg's Darren Robbins was sent a copy of the December 17, 1998 press release by his co-counsel in Blankenship on the day it was issued (S2270-72; S2965-66 ¶¶

13-17), together with a query as to how MedPartners' new excess coverage might affect the Blankenship suit (S2324-26).

The Settlement

In the January 15, 1999 Memorandum of Understanding, MedPartners' insurers agreed to pay $65M to settle all pending litigation, including the class actions described above, the shareholder derivative suit, and the Blankenship case (S1655-61). Lerach took the lead in negotiating the basic terms on behalf of all plaintiffs (R595-96); Lerach's partner, Keith Park, took the lead in drafting the formal, detailed Stipulation of Settlement (C5383-85). In the stipulation, the parties agreed to the certification of a settlement class, to the settlement of all pending and future class and derivative actions for $56M, and to the presentation of this settlement for final approval in the Circuit Court of Jefferson County (S1524, 1530-31, 1532, 1539-41, 1546-47). The dismissal of the Lauriello I appeal was an express condition precedent to the settlement (S1552 ¶7.1(g)), so that the claims asserted in Lauriello I were resolved in their entirety. The settlement of Blankenship, to which plaintiffs' counsel unilaterally allocated $9M of the $65M total the insurers had agreed to pay (D(Newman) 169), was likewise a condition precedent to the class settlement (S1551 ¶7.1(f)).

Lerach, Cauley, and Selinger Are Confronted With and Questioned About the AISLIC Policy

Starting on January 27, 1999, the federal TAPS lawyers, Toll and Squitieri, began pressing Lerach, Cauley, and Selinger for settlement details. In particular, they demanded more information regarding MedPartners' insurance coverage, once in a January 27 letter to Selinger and his co-counsel (S1663-66), and again in a February 3 letter to Cauley (S1668-70). Cauley declined the request on February 5 (S1738-40), and Selinger echoed that position on February 8, telling Toll and Squitieri: "We have no intention of providing our intelligence to you primarily to allow you to take potshots, and we will not" (S1748).

Toll and Squitieri were not satisfied. They replied to Cauley and Selinger on February 10, copying Lerach, and expressly questioned the adequacy of the settlement in view of the disclosure of the excess insurance in the December 17, 1998 press release. In doing so, they interpreted the press release as Defendants here have always asserted it can only be interpreted - as reflecting the insurer's "financial responsibility for the defense and ultimate resolution of the securities litigation," so that the insurer's ultimate liability was for <u>any</u> judgment or settlement, no matter how large:

> We understand MedPartners announced on December 17, 1998 that it entered into an excess insurance agreement with National Union whereby National Union would provide excess insurance coverage beyond MedPartners' existing D&O coverage with respect to the securities litigation and would thus assume financial responsibility for the defense and ultimate resolution of the securities litigation. Thus, <u>**if National Union had taken over the defense and was exposed to potentially $750 million in damages, what led you to conclude that $65 million was a fair and reasonable result?**</u> What was the excess coverage provided? Was the original coverage $50 million or did the excess coverage bring it to $50 million? All of these questions remain unanswered. (S1753, emphasis added)

Toll and Squitieri advised they would pursue confirmatory discovery "with regard to the entire settlement negotiation process, and with regard to MedPartners and the insurance policies" if they did not get more information (S1754).

Selinger and Kirby responded on February 11, 1999. Rather than addressing the substance of the inquiries regarding the publicly disclosed excess insurance coverage, they threatened to have Toll and Squitieri "relegated ... to the status of objectors or opt-outs" if they "persist[ed] in pursuing motion practice ... with the intent of delaying or derailing the settlement" (S1765).

Lerach, Cauley, and Selinger never gave Toll and Squitieri the requested insurance information (C5371-75; S971-72). Nor did Toll and Squitieri pursue the confirmatory discovery that was their right. Nevertheless, on April 28, 1999, Toll and Squitieri told their federal judge that "the federal court TAPS counsel are prepared to join in recommending the approval of the proposed settlement" (S1770). By then, Lerach, Selinger, and Cauley had agreed to cut Toll and Squitieri in on $1M of the attorneys' fees to be awarded in the settlement (S1783-84).

The Settlement Approval

The parties submitted the Stipulation of Settlement to Judge Wynn for preliminary approval on May 3, 1999 (S1400-73), and for final approval on July 9, 1999 (S1372-98).

On May 10, 1999, Judge Wynn, citing "numerous details, facts and circumstances about [the 1998 Litigation] which must be addressed ... in order for the proposed settlement to be considered," ordered production of, among other things,

> [d]etailed affidavits (subject also to examination by the Court) of descriptions as to the case prepa-

> ration, discovery and issues resolved, in addition to meaningful, compensable time spent by attorneys and paralegals involved herein on the above descriptions of work performed (S1797-98; R683).

Hare Wynn and North's co-counsel in Lauriello I, Milberg's Steve Schulman, was on the service list of the Court's May 10, 1999 Order (S1798).

On both May 12 and 14, 1999, Milberg sent letters to all plaintiffs' counsel, including Hare Wynn and North, seeking affidavits regarding the number of hours worked in connection with the litigation, for submission to Judge Wynn in response to his May 10 order (S3558-73, 3575-89). Neither Hare Wynn nor North submitted any information regarding their hours worked (R687, 689, 813); Hare Wynn provided no information at all, and North only provided an affidavit that the firm had "expended a total of $7,734.49 in unreimbursed expenses" (S1483).

Despite Hare Wynn/North's failure to submit their time, the joint affidavit that Selinger and Cauley submitted to Judge Wynn stated that "[e]ach firm representing plaintiffs in the actions comprising the Litigation has provided Plaintiffs' Settlement Counsel with an affidavit setting forth the number of hours expended by that firm in prosecuting the Litigation, as well as a detailed description of the expenses that firm incurred" (S1262 ¶61). Neither Hare Wynn nor North ever corrected this inaccurate statement to the Court (R687-88, 816).

On July 10, 1999, Judge Wynn issued the Final Judgment certifying a Rule 23(b)(3) class for purposes of settlement and approving the settlement (S2148-61). Judge Wynn approved the plaintiffs' proposed allocation of the $56M among the three subclasses ($29.5M to common stock/options, $25M to TAPS, and $1.5M to tender offer) (S1547; S2155 ¶9).[9]

Pursuant to the Final Judgment, the seventy-nine shareholders who requested exclusion from the Settlement Class were not bound by the terms of the settlement (S3644-51). The Final Judgment awarded plaintiffs' counsel 33% of the settlement fund ($18,480,000) as fees and found that award to be "fair and reasonable" (S2160, 3653-56).

What the Hare Wynn and North Firms Did – And Did Not Do – About the Settlement

The JPA among Milberg, Hare Wynn, and North mandated that no "material steps" be taken without the consent and agreement of all three signatory firms (S2236 ¶1). Never-

[9] Because plaintiffs' lawyers told him he did not need to, Judge Wynn neither considered nor approved the allocation of $9M of the $65M settlement amount to the Blankenship plaintiffs (S1417-19).

theless, Milberg did not get the consent of Hare Wynn or North to begin (S751) or conclude (R596, 768-69) settlement negotiations. Later, other lawyers told North's Tim Francis (who, in turn, told Hare Wynn's John Haley) that Lerach had negotiated a settlement (R594-95, 716).

Mr. Haley was "elated" when he learned the cases had been settled for $65M (R597-98). As he testified:

> A sixty-five-million-dollar settlement at that point in time in Birmingham, Alabama was a big deal, and so lawyers were talking about it all over Birmingham, that they had accomplished this great settlement and that MedPartners – they had gotten more than the amount of insurance. (S769)

Notwithstanding (or, perhaps, because of) his elation at the amount of the settlement, Mr. Haley did not immediately reach out to Milberg to discuss it (S752-53). His reason was simple: "[T]he settlement was for so much money that nobody could legitimately question the amount of the settlement" (D(Haley)73).

After learning of the settlement, Hare Wynn and North did nothing to assess its fairness and, in particular, did not investigate the extent of MedPartners' insurance. Upon learning through "word on the street" (R613-14) that the case had settled for $65M and that that was more than all of the available insurance, Mr. Haley never asked Milberg or any other plaintiffs' counsel if they had received copies of any insurance policies, or even what they knew about insurance limits (R617-18, 626). He never asked if they had performed confirmatory discovery, and he never suggested that they should do so (id.). He never took any confirmatory discovery of his own, nor did he do any other investigation (id.). His statements and testimony about what he knew about the excess insurance, and when he knew it, are contradictory (compare S1194 ("Of course, we knew there was excess coverage") with R606-07; S756-57). Ultimately, all he did was listen to what others said at the final fairness hearing and rely upon the "integrity of the process" (S846; R621-23).

Mr. Francis's inaction mirrors that of Mr. Haley. After hearing from Cauley's Alabama counsel that "they had got the policy limits and some" (R717, 741), he never asked – and was never told – what those policy limits were (R719-20, 741-42). His firm did no independent work of any kind to investigate the extent of MedPartners' insurance coverage or assess the reasonableness or fairness of the settlement. They never asked anyone for any documents (R724-25) and never even reviewed any MedPartners press releases or public filings (R733-36, 753-54; S623-24). From the time he learned of the settlement through the final fairness hearing, Mr. Francis had no discussions with anyone regarding the amount of available insurance coverage (R732-34, 740-42). It was not his job: Like their colleagues at Hare Wynn, the North lawyers "were relying on the process and Milberg Weiss and all of the other plaintiffs' lawyers" to evaluate the fairness of the settlement (S631-32; R755).

What the Hare Wynn and North Firms Did About Their Fees

Although content to let others investigate the adequacy of the proposed settlement, Hare Wynn and North became very involved when they thought — like Toll and Squitieri — that Lerach was trying to short-change them on fees (S1060; R627-28, 635). Lerach felt that "the folks in Alabama weren't entitled to what they were seeking," because they had had nothing to do with Padilla or Blankenship and because the Lauriello I complaint had been dismissed (S980-81). Hare Wynn's answer was to threaten to derail the entire settlement by bringing the fee dispute before Judge Wynn - which, they believed, would cause the judge plaintiffs had chosen to approve the settlement and fee request to step aside because he had family at Hare Wynn (S1060; R635-36).

In a conversation shortly before the final fairness hearing, Lerach told Haley that the settlement was an "excellent" one – a statement, Defendants will argue at trial, he made <u>without</u> reference to the amount of available insurance (R614-15). Lerach followed up with a letter accusing Hare Wynn of "bad faith" in attempting to "aggrandize your own fee position" in a manner that "conflicts with your duties to the class to get this settlement approved" (S1062-63; R636-38). Hare Wynn filed its recusal motion anyway (S1475-81), arguing at the hearing that Judge Wynn should recuse himself in light of the fee dispute (S1374). Neither in the motion, at the hearing, nor at any other time was Judge Wynn told the JPA's terms or that Hare Wynn/North were claiming fees for cases they had never worked on as well as from <u>Lauriello I</u>.

Judge Wynn did not recuse himself (S1375). He deferred ruling on fee allocation so as not to hold up the settlement (<u>id</u>.; R641-42); the Final Judgment approving the settlement and the massive overall fee was entered the next day (S2148-61). On July 19, Judge Wynn approved a stipulated order (S1775) allocating $4,807,250 of the $18,480,000 gross fee[10] to Lerach's group, $7,865,500 to Selinger's, and $5,057,250 to Cauley's. Derivative counsel got $250,000, and $500,000 went to Toll and Squitieri.[11] The order references no specific allocation to Hare Wynn or North, providing only that each group was "responsible for the allocation of [its] portion of the award to [its] co-counsel or referring counsel within [its] group" (id.).

The fee dispute between Hare Wynn/North and Milberg was resolved a few days later (S3666). Hare Wynn/North received a total of $2,543,458, about $1.7M from the class actions and about $800,000 from Blankenship (S723, 1056; R645, 650-51, 697, 793-94).

Hare Wynn/North performed no work whatsoever on behalf of the Blankenship or Padilla plaintiffs (S2964, 770-71, 819; R651-52, 794-96). None of the Blankenship plaintiffs (R797; S2965; S773-76) or the Padilla plaintiffs (S771;

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[10] The total fee was actually more – about $20.7M – because Lerach got (and, as discussed below, shared with Hare Wynn/North) about $2.3M from the $9M Blankenship settlement in addition to his fee in the class settlement.

[11] The payment to Toll and Squitieri was less than the $1M they had been promised, which engendered nasty (but private) correspondence and a further payment to them by Cauley (S1781-89).

R796-97) was even made aware that Hare Wynn/North got fees in connection with their settlements. Indeed, until the fee dispute with Lerach, the reverse was also true: Hare Wynn/North did not know that these plaintiffs existed (S2646 ¶5; R651-52).

After obtaining a fee from Milberg for cases they neither referred nor worked on, Hare Wynn/North also decided, without seeking court approval (R661, 801-03), to pay a portion of their fee award to their non-lawyer client Lauriello. They paid him $76,870.38, the full amount of his loss (R657-58, 798-99), and he also kept the $2,356 he received from the settlement fund (S2181; R658, 800-01). Lauriello thus got more than his total loss on his MedPartners investment, and over 30 times the amount to which he was entitled under the settlement approved by Judge Wynn.

STATEMENT OF THE STANDARD OF REVIEW

This Court applies "an abuse-of-discretion standard of review to a trial court's class-certification order, but ... will review de novo the question whether the trial court applied the correct legal standard in reaching its decision." Compass Bank v. Snow, 823 So.2d 667, 671 (Ala. 2001). Here, the trial court's failures in applying Ala.

Code §6-5-641 - in particular, its refusal to consider Defendants' statute of limitations defense and its improper forays into merits determinations - are subject to de novo review. See General Motors Acceptance Corp. v. Massey, 893 So.2d 314, 320 (Ala. 2004); Mayflower Nat'l Life Ins. Co. v. Thomas, 894 So.2d 637, 641-42 (Ala. 2004).

The abuse-of-discretion standard on class certification is substantially more rigorous than in other contexts:

> [A]n abuse of discretion in certifying a class action may be predicated upon a showing by the party seeking to have the class-certification order set aside that "the party seeking class action certification failed to carry the burden of producing sufficient evidence to satisfy the requirements of Rule 23." Thus, we must consider the sufficiency of the evidence submitted by the plaintiff[s]. Compass Bank, 823 So.2d at 672 (citation omitted)

If the plaintiffs "fail to meet the evidentiary burden as required by Rule 23, then the order certifying the [class] constitutes an abuse of discretion by the trial court." Smart Prof'l Photocopy Corp. v. Childers-Sims, 850 So.2d 1245, 1249 (Ala. 2002).

SUMMARY OF THE ARGUMENT

The trial court erred in certifying this nationwide class under Rule 23(b)(3). Plaintiffs allege fraudulent misrepresentation and suppression; reasonable reliance is an essential element of both claims. Defendants are entitled to examine each class member as to what he knew (or should have known) about the excess insurance policy and what, if anything, he relied on in deciding to participate in the settlement. As in every other fraud case this Court has decided since passage of the Class Action Statute, these individual reliance issues predominate and preclude certification under Rule 23(b)(3).

That the reliance (or lack of it) of class counsel, as agents of the 1998/99 class, is theoretically a common issue does not change the result. Even if an agent is defrauded, the principal has no claim if he knew the facts, and numerous class members received direct, personal disclosure of the excess insurance <u>before</u> they received notice of the settlement. What each class member knew, and what he did with that knowledge, remains exactly the individual issue that has always been held to predominate in fraud cases.

Plaintiffs' "entity" theory, adopted by the trial court, contravenes this Court's express holding in <u>Ex parte Caremark</u> that it is the "<u>members</u> of the purported class" who must be analyzed "in terms of their relationship to the particular claims and defenses to be asserted." 956 So.2d at 1125 (emphasis added). A Rule 23(b)(3) class is not a corporation, and the trial court erred in treating it as one in order to define the necessary predominance inquiry out of existence.

Entirely apart from reasonable reliance, tolling of the statute of limitations is an individual issue that predominates over any common issues. The statute ran more than two years before this action was filed unless, as to any individual class member, he can establish that he did not know, and should not reasonably have known, of the excess insurance. That overarching, predominating individual issue is by itself sufficient to preclude certification.

The lawyers and law firms designated as class counsel could not adequately represent the class even if one were otherwise properly certifiable. Most of them were involved in and received attorneys' fees for the 1998 Litigation, and they will be necessary, non-cumulative witnesses – adverse to the class – on Defendants' positions that the settlement was fair and reasonable regardless of the amount of insurance available; that there were no misrepresentations by Defendants; and that plaintiffs' counsel in the 1998

Litigation knew or should have known about the excess insurance coverage, but spent far more time wrangling over their fees than pursuing additional information about it. Because their testimony will be adverse to their clients, not only the individual lawyers but also their firms are barred from representing the class. Contrary to the trial court's holding, this issue is ripe for adjudication and must be addressed now.

Moreover, three instances of questionable/improper fee-splitting – two in the underlying action and one in this case – also require holding counsel inadequate to represent the class. In the underlying case, counsel took fees from two cases on which they did no work and were not referring counsel, and they paid a portion of class counsel fees over to Mr. Lauriello, a non-lawyer, <u>without</u> informing Judge Wynn, as class action practice requires. In this case, they short-circuited the <u>McArthur</u> plaintiffs' attacks on them and on their client Lauriello – attacks that this Court expressly held in <u>Ex parte Caremark</u> needed to be aired – by agreeing that counsel for McArthur could have up to 7.5% of any fees awarded. Because assessing the fairness of the entire settlement necessarily requires scrutiny of the conduct of all of the lawyers who participated in the settlement, it is not reasonable or appropriate to burden this putative class with counsel's prior fee-related conduct.

Certification was also inappropriate because the class as certified is impermissibly broad. There were three subclasses in the underlying action, with three distinct sets of representatives and claims. The named plaintiffs in this action, however, are all members of a single one of those subclasses, and they cannot adequately represent the distinct interests of the other two. This conflict is not, as the trial court held, "resolved" by the allocation formula used in the 1999 settlement. That formula was created not in the abstract but to allocate the $56 million settlement amount in those cases; if that formula were followed here, it could result in recovery of well over 100% of claimed damages for whole swaths of the putative class.

Finally, no class could possibly include individuals who never submitted claims in the 1998 MedPartners Securities Litigation. The claims of the claimant class representatives are not typical of non-claimants; the extreme weakness of non-claimants' claims (if, indeed, they exist at all) creates an inherent conflict that precludes combining claimants and non-claimants in a single class.

ARGUMENT

I

AS IN EVERY OTHER FRAUD CASE THIS COURT HAS DECIDED SINCE PASSAGE OF THE CLASS ACTION STATUTE, INDIVIDUAL ISSUES PREDOMINATE HERE AND PRECLUDE CERTIFICATION

This Court has been forthright in its "reluctan[ce] to find fraud claims suitable for class certification," Ex parte Green Tree Fin'l Corp., 723 So.2d 6, 10 n.2 (Ala. 1998), and has even admonished that "a fraud claim is wholly inappropriate for class treatment and should be handled in a separate proceeding." Ex parte GEICO, 729 So.2d 299, 307 n.3 (Ala. 1999)(emphasis added). Indeed, this Court has not once since the 1999 adoption of the Class Action Statute permitted certification of a fraud class action under Rule 23(b)(3), rejecting certification in each of the seven instances in which the issue was before it.[12] With

[12] Ex parte Household Retail Servs., Inc. ("Ex parte HRS"), 744 So.2d 871 (Ala. 1999); Compass Bank v. Snow, supra; Reynolds Metals Co. v. Hill, 825 So.2d 100 (Ala. 2002); Alfa Life Ins. Corp. v. Hughes, 861 So.2d 1088 (Ala. 2003); Voyager Ins. Cos. v. Whitson, 867 So.2d 1065 (Ala. 2003); University FCU v. Grayson, 878 So.2d 280 (Ala. 2003); Regions Bank v. Lee, 905 So.2d 765 (Ala. 2004).

reasonable reliance an element of a fraud plaintiff's case, this Court has consistently held that individual issues predominate over common issues, precluding class certification under Rule 23(b)(3). The same is true in this case.

The trial court swept aside this Court's precedents by holding that "individual knowledge and reliance is irrelevant" (C5774-75). The class members had shared agents (i.e., settlement counsel) in the underlying litigation, the court said, and the class was defrauded as an "entity" (C5774). In so holding, the court trampled on this Court's decision in Ex parte Caremark, ignored black-letter agency law, and set this case on a collision course with the due process rights of both Defendants and the absent class members.

The tolling of the statute of limitations must also be adjudicated separately as to each class member. That by itself precludes certification. So does the existence of class members in each of the 50 states, many of which have differing rules (in particular, regarding reliance) for fraud claims that could lead to multiple separate issues and adjudications.

A. This Court's Rule 23(b)(3) Jurisprudence in Fraud Cases

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Thus, "[w]hen individual issues predominate over the common claims, manageability of the action as a class is not possible," and the class cannot be certified. Voyager v. Whitson, 867 So.2d at 1077. Fraudulent misrepresentation and suppression claims require proof that plaintiff (1) was aware of a false statement or not aware of a suppressed fact, and (2) reasonably relied on the statement or lack thereof to his detriment. Reynolds Metals, 825 So.2d at 105 (misrepresentation); Ex parte HRS, 744 So.2d at 871, 879 (suppression). In a fraud claim, therefore, the plaintiff's own conduct is a crucial element of the plaintiff's case. Because that is an inherently individual inquiry, fraud claims are unsuitable for class treatment.

Alabama law is clear on this. Where there is "material variation ... in the kinds or degrees of reliance by the person to whom [alleged misrepresentations or omissions] were addressed," individual issues predominate. Ex parte HRS, 744 So.2d at 880. This is true even when the alleged misrepresentation or omission is common to the entire class. Reynolds Metals, 825 So.2d at 105; Ex parte Green Tree, 723 So.2d at 10; Alfa Life, 861 So.2d at 1097.

Indeed, this Court has twice vacated class certifications in cases alleging uniform, class-wide fraud or suppression because individual issues of reliance still predominated. In University FCU v. Grayson, this Court vacated certification notwithstanding that each class member received the same printed form containing the same alleged misrepresentations. Even with a completely common misrepresentation, individual reliance issues predominated. 878 So.2d at 287-89.

Likewise, in Regions Bank v. Lee, a putative class of bondholders brought suit against the indenture trustee. Plaintiffs alleged fraudulent suppression arising from the trustee's delay in providing notice of events of default. 905 So.2d at 769. In vacating certification for predominance reasons, among others, this Court again highlighted individual reliance issues: certain bondholders may have learned of the possibility of default earlier than when the trustee sent official notice, and some bondholders may not have received notice at all due to not being registered owners. Id. at 775 n.10. Furthermore, "individual issues of fact" existed about whether each bondholder would have acted any differently had he or she received notice on time. Id. at 776.

A putative fraud class cannot evade the mandate of Rule 23(b)(3) by putting off the question of reliance or presuming it away. This Court has expressly rejected the option of bifurcating fraud class actions to address reliance problems, holding that the predominance question "should be addressed at the initial stage of the proceeding." Ex parte HRS, 744 So.2d at 881. Likewise, this Court has rejected any class-wide presumption of reliance – such as the "fraud-on-the-market" theory – in the common-law fraud context. See id. at 880 n.2; Regions Bank, 905 So.2d at 771.

B. Individual Knowledge and Reliance Are Not "Irrelevant," and the Trial Court Erred in Holding That They Were

As with almost every putative fraud class action, individual issues of knowledge and reliance predominate here. The fraud issue is not merely whether the case should have settled for what it did but also whether any particular class member knew about the insurance and chose to participate in the settlement anyway, rather than exercise his or her constitutional right[13] to opt out.

A class member who knew the facts about the insurance but nevertheless decided to accept the settlement simply was not defrauded. Accordingly, Defendants will be entitled to ask each class member (i) whether he read or otherwise learned about any of the five public disclosures by MedPartners concerning the excess insurance; (ii) how he interpreted those disclosures; (iii) his reasons for participating in the settlement; and (iv) whether he would have participated in the settlement even if he knew about the excess insurance. All of these issues are relevant to the element of reasonable reliance; all would not only cause individual issues to predominate in any trial in this case but would derail any trial altogether. This is not abstract or hypothetical: Every class member deposed in this case relied on different information and had different reasons for choosing to be bound by the settlement (C5673, 5731-34 (S904, 909, 914, 573-79, 854-61, 564-68, 662-70)).

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[13] See Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2559 (2011).

There were other differences among class members as well. Those who were stockholders of MedPartners in 1999 received in the mail the MedPartners 1998 10-K, with its detailed disclosure of the excess policy; those who were not then current stockholders may or may not have seen the 10-K. The only way to know will be to ask them. There are obvious potential differences in knowledge and reliance between the two groups, as well as differences within the current-shareholder group as to what they thought and did on receiving the 10-K. See University FCU v. Grayson, 878 So.2d at 287-89; Regions Bank, 905 So.2d at 775-76 & n.10.

So, too, at least one potential class member - a plaintiff in Blankenship - reviewed the December 17, 1998 press release disclosing the Policy on the day it was issued and asked what impact it would have on the resolution of the 1998 Litigation (S2324-26). Class members like him have a whole different set of questions to answer.

That class members in the underlying litigation were represented by counsel does not obviate these individual inquiries. It is basic agency law that a principal who actually knows the truth has no fraud claim even if his agent was deceived.[14] E.g., Su v. M/V Southern Aster, 978 F.2d 462, 473 (9th Cir. 1992) ("[I]f the principal knows the true facts, the attempted deception may not be imputed to the principal."), cert. denied, 508 U.S. 906 (1993); Sonecha v. New England Life Ins. Co., 124 Fed.Appx. 143, 146 (3d Cir. 2005) (same). The same is true here. Regardless of the agency relationship between the settlement class and its counsel, it remains relevant whether individual class members either knew or cared about the amount of available insurance. Plaintiffs' own expert admitted all this (R414-16).

The trial court wrongly rejected this point, adopting Plaintiffs' argument that the victim of the alleged fraud here was the 1999 settlement class as an "entity," not the individual class members (e.g., R132-33, 135). Finding that "entity law" was the appropriate framework, the court analogized this case to one alleging fraud on a corporation, in which "one would not have to show individual reli-

[14] While not yet ripe for final adjudication, it bears repeating that the allegedly "deceived agents" — the settling lawyers — both had the press release disclosing the excess coverage and corresponded amongst themselves about the extent of the coverage long before they sought court approval of the settlement.

ance by each and every shareholder" (C5774). The court then asserted, without citation, that "when applying agency law to entities with large numbers of principals," it does not matter whether the principal knew the true facts (id.). The court concluded:

> 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. (C5774-75; emphasis added)

The "entity theory" adopted below is flatly contrary to this Court's 2006 decision in this case. The whole point of the certification analysis in Ex parte Caremark was to reverse the holding that the 1999 class was all that mattered. The existence of the 1999 class, this Court held, established no more than that "a discrete and identifiable group of individuals" could conceivably bring claims against Defendants here; it was "**the members of the purported class**," who "must be analyzed in terms of **their** relationship to the particular claims and defenses to be asserted in the class action." 956 So.2d at 1125 (emphasis added). Lest there be any doubt, this Court reiterated that it was the "**claims of the purported class members**" -

not the imagined single claim of an abstract class entity – that "must be analyzed" before certification. Id. at 1126 (emphasis added). Not once in the opinion did this Court suggest that the claims asserted here belong to anyone other than the individuals constituting the putative class.

Ex parte Caremark is the law of this case. It requires rejection of the trial court's latest "entity law" analysis and reversal of its most recent order granting certification.

The entity theory is also wrong in its own terms. The trial court held – as it had to in order to evade this Court's clear class action fraud jurisprudence – that individual reliance is entirely irrelevant here. Irrelevant? Consider a class member who actually read the December 1998 press release or the MedPartners 10-K, interpreted it (correctly) as indicating that there was enough insurance available to pay any judgment, no matter how large, but still decided to participate in the settlement because he thought the settlement was fair. If the trial court's entity theory were correct, then Defendants would be barred from presenting any such evidence at trial; such evidence would be "irrelevant" and inadmissible (C5775), since only the reliance of the class (through its agents) matters.

As a matter of due process, however, that cannot be right. "'Due process requires that there be an opportunity to present every available defense.'" Lindsey v. Normet, 405 U.S. 56, 66 (1972). The court's entity theory deprives Defendants of that opportunity and thus violates their right to due process. See, e.g., Thorn v. Jefferson-Pilot Life Ins. Co., 2004 WL 5745993, at *3 (D.S.C. 2004) (denying certification because of due process concerns about defendant's ability to raise individual defenses), aff'd, 445 F.3d 311 (4th Cir. 2006); Novak v. Home Depot U.S.A., Inc., 259 F.R.D. 106, 116 n.7 (D.N.J. 2009) ("'[defendant] has a fundamental due process right to raise affirmative defenses as to individual plaintiffs'").

The trial court's entity theory also violates the due process rights of the putative class members, because it would effectively nullify Rule 23(b)(3)'s opt-out right.[15]

[15] "In the context of a class action predominantly for money damages [which, of course, is the case here], ... absence of ... opt-out violates due process." Wal-Mart v. Dukes, 131 S.Ct. at 2559. Under Plaintiffs' theory, however, "the class itself is what was defrauded," so "by logical definition, individual class members can't litigate that claim"

Footnote continued on next page.

Incorrect results flow from the entity theory because the theory is incorrect. Class claims under Rule 23(b)(3) are not unitary claims of an entity but are "an aggregation of what are unambiguously pre-existing individually held claims." Redish & Larsen, Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process, 95 Cal. L. Rev. 1573, 1593 (2007). A Rule 23(b)(3) class, therefore, is not like a corporation, and the trial court's analogy cannot stand.

C. The Predominance of Individual Issues as to the Statute of Limitations Is Indisputable and By Itself Precludes Certification

Reversal of certification here is also required by the individual inquiries needed to adjudicate the statute of limitations. What each class member knew about the excess insurance, and when he knew it, will be at issue to determine whether, as to that class member, the statute of limitations has run or has been tolled.

The two-year fraud statute of limitations runs from the time the plaintiff knew or reasonably should have known the facts that were allegedly misrepresented or suppressed.

Footnote continued from previous page.

(R145). No individual litigation means no opt-out, and due process is gone.

Ala.Code §6-2-38(l); Kelly v. Smith, 454 So.2d 1315, 1317 (Ala. 1984). This action was brought on October 22, 2003. Accordingly, the claim of any class member who knew or should have known of the existence and scope of the excess insurance on or before October 21, 2001 is barred by the statute of limitations.

It is Defendants' position that with all the public disclosure of the insurance as early as 1998, every class member (and every lawyer involved in the case) had constructive knowledge of the existence and scope of the excess insurance long before October 2001. See, e.g., Batchelor v. Batchelor, 502 So.2d 751, 753 (Ala. 1987); In re Verilink, 405 B.R. 356, 368-69 (Bankr.N.D.Ala. 2009); see also R606 (public disclosure of the facts allegedly concealed starts the statute running). That was the basis for Defendants' motion to dismiss in 2004, and Defendants continue to press that view.

Even if the court were to reject that view, Defendants would still be entitled to show that any given class member, based on public disclosures and other information available to that class member, knew or should have known of the insurance and understood or should have understood that the insurer would handle any settlement or judgment, no matter how large. That issue, by definition, is individual. It would violate due process to deprive Defendants of the opportunity to try that issue against each and every class member. See Thorn v. Jefferson-Pilot Life, supra (denying certification because defendant has due process right to present individual statute of limitations defenses).

The trial court erred when it brushed this issue aside as "a hypothetical conflict regarding an affirmative defense" (C5775). Courts routinely refuse to certify classes under Rule 23(b)(3) when individual issues in connection with a statute of limitations defense predominate over issues common to the putative class.[16]

In any event, the statute of limitations defense in this case is far from hypothetical. Indeed, at least one potential class member not only read the December 17, 1998 press release but went so far as to ask his attorney its

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[16] See, e.g., Thorn, 445 F.3d at 321-27; Johnson v. Kansas City Southern Ry., 208 Fed.Appx. 292, 296-97 (5th Cir. 2006); Butler v. Sterling, Inc., 2000 WL 353502, at *7 (6th Cir. 2000); Fisher v. Ciba Specialty Chemicals Corp., 238 F.R.D. 273, 308-10 (S.D.Ala. 2006); LaBauve v. Olin Corp., 231 F.R.D. 632, 674-75 (S.D.Ala. 2005).

significance (S2324-26). Moreover, the 1998 MedPartners 10-K, which contained a public disclosure regarding the excess insurance, was mailed to all then-current MedPartners shareholders in April 1999 (S1894, 3929-30). The settlement class in the 1998 Litigation encompassed both former MedPartners shareholders (such as Sam Johnson (S2637-38)) and current shareholders (such as James O. Finney (S2532-33)). Thus, many - but not all - putative class members were sent the 10-K directly. Others not sent the 10-K directly may nevertheless have seen it, since the 10-K was publicly available once filed with the SEC on April 15, 1999. This is exactly parallel to the notice to bondholders in Regions Bank v. Lee. The inquiry here as to whether each putative class member knew or should have known about the alleged fraud will be individualized.

Finally, although the statute of limitations is an affirmative defense in general, the crucial issue here is one on which Plaintiffs bear the burden of proof. Where, as here, the statute would have run but for an assertion that tolling under Ala.Code §6-2-3 is in play, plaintiff must plead and prove that tolling is appropriate. Amason v.

First State Bank, 369 So.2d 547, 550 (Ala. 1979); Parsons Steel, Inc. v. Beasley, 522 So.2d 253, 256 (Ala. 1988).

Because individual issues as to the statute of limitations will predominate over any common issues, the order certifying the class is due to be reversed.

D. Individual Issues Also Predominate Because the Laws of Differing States Apply to the Class Members' Fraud Claims

Alabama applies lex loci delicti to fraud cases, so the governing law is the law of the state where the injury occurred. E.g., Fitts v. Minnesota Mining & Mfg. Co., 581 So.2d 819, 820 (Ala. 1991). The state where the injury occurred is the state in which the plaintiff suffered the economic impact, e.g., Glass v. Southern Wrecker Sales, 990 F.Supp. 1344, 1348 (M.D.Ala.), aff'd, 163 F.3d 1361 (11th Cir. 1998), which is generally the state of plaintiff's residence or principal place of business, e.g., Reibling v. Thermo Credit, L.L.C., 2008 WL 2115336, at *3 (Bankr.S.D. Ala. 2008). Here, putative class members reside in all fifty states, so the laws of all fifty states will have to be considered in evaluating the proposed class members' claims.

The law governing fraud claims varies - and, in many instances, conflicts - from state to state.[17] Such circumstances give rise to "grave concerns as to whether any national class of plaintiffs in an action involving the application of differing laws of numerous states can satisfy" the predominance requirement. Green Tree, 723 So.2d at 11.

Here, the trial court recognized that "'Alabama courts apply the law of the state where the injury occurred'" (C5772), but it went on to conclude that Alabama law applied to all putative class members' claims because "the last event necessary to ... consummate the cause of action for fraud was Judge Wynn's entry in Alabama of a final approval order on July 10, 1999" (id.). This application of Glass, supra, was error. The "site of the injury" and the "site of the event that created the right to sue," see 990 F.Supp. at 1347, are not alternatives; they are one and the same: "[T]he place of injury 'is the locale in which the

[17] For instance, New York, Ohio, and West Virginia apply a "justifiable reliance" standard, see, e.g., Kaufman v. Cohen, 760 N.Y.S.2d 157, 165 (App.Div. 2003); Geo-Pro Servs. v. Solar Testing Laboratories, Inc., 763 N.E.2d 664, 673 (Ohio App. 2001); Wilt v. State Auto. Mut. Ins. Co., 506 S.E.2d 608, 611 (W.Va. 1998), whereas Alabama has rejected the "justifiable reliance" standard in favor of "reasonable reliance," see, e.g., Foremost Ins. Co. v. Parham, 693 So. 2d 409, 421 (Ala. 1997).

last event necessary to make a defendant liable for an alleged tort occurs,'" so that "[w]here, as here, the injury in question is financial, the location where the financial injury was felt is determinative under lex loci delicti." Chambers v. Cooney, 2007 WL 2493682, at *11 (S.D.Ala. 2007) (emphasis added). That is where each class member resides, not where the judgment approving the settlement was entered.

The trial court further erred in holding that the choice of law provision in the Stipulation of Settlement "encompasses this fraud-in-the-settlement action" (C5773). Where, as here, the claim is for fraudulent inducement of a contract containing a choice-of-law clause, Alabama applies lex loci delicti to the fraud claim even though it would honor the choice of law clause in a claim for breach of contract.[18] Nor did Defendants fail to give timely notice under Ala.R.Civ.P. 44.1. The named Plaintiffs are all Alabama residents, so choice of law was not at issue at the pleading stage but only on the class certification motion - when Defendants did give notice. Notice under Rule 44.1 is

[18] Williams v. Norwest Fin. Alabama, Inc., 723 So.2d 97, 101 (Ala.Civ.App. 1998); Branch Banking & Trust Co. v. Syntellect, Inc., 2010 WL 2947772, at *4, *9 (M.D.Ala. 2010).

routinely held timely even when given much later in the proceedings than was done here.[19]

Accordingly, certification should have been denied because an action involving the different laws of many different states cannot satisfy the predominance requirement.

II

BECAUSE MESSRS. HALEY, NORTH, AND FRANCIS WILL BE NECESSARY WITNESSES ON THE MERITS ADVERSE TO THE CLASS, NEITHER THEY NOR THEIR FIRMS CAN BE CLASS COUNSEL HERE

Even if the predominance requirement did not doom this class, the requirement of Rule 23(a)(4)that the class representatives "fairly and adequately protect the interests of the class," would. Under Rule 23(a)(4), class counsel must "be qualified, experienced, and generally able to conduct the litigation." Regions Bank v. Lee, 905 So.2d at 770; Ex parte GEICO, 729 So.2d at 309. Class counsel here, however, will be necessary witnesses for the defense, and their testimony will be adverse to the class. Accordingly, they are unable to conduct this litigation under the Alabama Rules of Professional Conduct and are thus inadequate

[19] Cherokee Ins. Co. v. Sanches, 975 So.2d 287, 295 (Ala. 2007) (32 days before trial); Shelter Mutual Ins. Co. v. Barton, 822 So.2d 1149, 1155 n.5 (Ala. 2001) (one month before trial).

under Rule 23(a)(4). See, e.g., Irvin E. Schermer Trust v. Sun Equities Corp., 116 F.R.D. 332, 338 (D.Minn. 1987) (denying certification motion where, inter alia, class counsel's testimony was "likely to be essential" at trial); 5 Newberg on Class Actions §15:23, at 82 (4th ed. 2002) ("Class certification may be denied when counsel may be an essential witness at trial.").

The trial court erred in attempting to dodge this issue by putting it off for another day (C5764). It must be addressed now.

A. Class Counsel Will Be Necessary Witnesses Adverse to the Class

Under Ala.R.Prof.Conduct 3.7(a), a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Where, as here, the lawyer will be called as a witness against his client, the disqualification is not only of the lawyer but of his entire firm. Ex parte Brown, 551 So.2d 1009 (Ala. 1989). The same is true if the lawyer will be called on a central matter in the case. Ex parte Sanders, 441 So.2d 901 (Ala. 1983).

Messrs. Haley, North, and Francis were all involved in the 1998 Litigation and its settlement, and they are essential, non-cumulative witnesses for the defense on several key issues. Accordingly, none of these lawyers - and none of their firms - can represent the class.

1. Class Counsel Will Be Necessary Witnesses on Lack of Materiality and Lack of Reliance

One of Defendants' arguments on the merits will be that even if there were a misrepresentation or suppression, it was immaterial: the $65M settlement was fair and reasonable regardless of the amount of available insurance. In support of that theory, Defendants are entitled to have the jury hear Mr. Haley's testimony that "the settlement was for so much money that nobody could legitimately question the amount of the settlement" (D(Haley)73). That testimony by itself prevents Hare Wynn from acting as class counsel.

Beyond that, the contemporaneous views of Bill Lerach, who negotiated the settlement for the 1999 class, are plainly relevant on this score, but Lerach cannot be compelled to come to Alabama for this trial, and he suffered almost total amnesia at his deposition in this action.[20] Cauley is in prison, and Selinger is dead. Thus even if the trial court were correct to hold (C5764) that only the conduct of Lerach, Cauley, and Selinger is relevant,

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[20] E.g., D(Lerach)18, 19-20, 22-23, 31-32, 33, 38-39, 43, 44, 46, 47-48, 49-50, 59, 60-63.

Messrs. Haley and Francis offer critical testimony about the particulars and reasonableness of that conduct.

Messrs. Haley and Francis are among the few witnesses in a position to testify to Lerach's contemporaneous assessments of the settlement. Lerach told Mr. Haley that the settlement was an "excellent" one, and he said that without reference to insurance (R615). Defendants will be entitled to argue that the absence of a statement that the litigation had settled for all the available insurance money, plus some (R614-15; S632) — coupled with the other evidence in the record about what the settling lawyers, including Milberg, knew — means that Lerach and others were not relying on the amount of available insurance as a settlement driver. The testimony of Messrs. Haley and Francis is central to making that argument.

Similarly relevant is Mr. Francis's conclusion from his conversations with Lerach that Lerach believed he had gotten "all the money the insurance companies were willing to pay to settle the case at that time" (R777). That, of course, is a very different thing from being told that plaintiffs in 1999 got the policy limits, and it corroborates Defendants' view of the negotiations and settlement.

Another of Defendants' arguments will be that plaintiffs' counsel as a group, and particularly the settlement lawyers, did not rely in any way on the amount of insurance available. First, Messrs. Haley and Francis relied completely on Lerach, Cauley, and Selinger to investigate the fairness and adequacy of the settlement (R621-23, 755; S631-32). Their testimony as to what settlement counsel should have done provides a crucial contrast to what settlement counsel actually did do – a contrast that is probative of settlement counsel's lack of reliance on any information provided by the Defendants. For example, Mr. Haley testified that the Toll letter was sufficient to impel its recipients (if, of course, there was real concern about insurance) to go to AIG and MedPartners and ask the questions Messrs. Toll and Squitieri were asking them (R626). Mr. Haley also agreed that a fax containing two MedPartners press releases (S1169-83) put Cauley and Milberg on notice to investigate the statements therein about excess insurance (S801-03). Likewise, Mr. Francis testified that it was "incumbent to people who had been appointed plaintiffs' counsel" to look at the Company's public filings and press releases in investigating the fairness of the settlement

(R754). He also stated that if a lawyer responsible for evaluating the settlement was not sure what the December 1998 press release meant, that lawyer had a duty to investigate further (R759-60). Especially given Plaintiffs' theory and the trial court's conclusion that Lerach, Selinger, and Cauley were acting as the agents of the 1999 class, Defendants must be allowed to offer this evidence of co-counsel's harsh judgment of settlement counsel's conduct.

2. Class Counsel Will Be Necessary Witnesses on the Existence of a Misrepresentation

That Plaintiffs' misrepresentation claim has always been a moving target (R600-10, 654-55) underscores that it is entirely circumstantial. Even after the depositions of all available key players, there is no evidence of any statement by AIG or MedPartners concerning the amount of insurance other than (a) MedPartners' various public disclosures and (b) a MedPartners lawyer's true-when-made statement in the summer of 1998, well before the purchase of the AISLIC Policy, that MedPartners had $50M in D&O coverage. Defendants will be entitled to ask each plaintiffs' lawyer from the 1998 Litigation if he is aware of any false statement about insurance made by any of the Defendants to them or to <u>any</u> of the other plaintiffs' lawyers. Both Mr. Haley and Mr. Francis have acknowledged that no one on behalf of MedPartners or any of the AIG Defendants made <u>any</u> such representations to them (R612-13, 752; S823-24). Defendants are entitled to present that testimony at trial.

3. Class Counsel Will Be Necessary Witnesses on Their Own Lack of Disclosure to Judge Wynn

It is undisputed that the only lawyers who ever said anything to Judge Wynn about insurance were lawyers for the 1998 plaintiffs. Plaintiffs' suppression claim here turns, in part, on their assertion that Defendants should have said something because Judge Wynn asked about insurance in his May 10, 1999 order of preliminary approval. That same order, however, contained provisions concerning disclosure of hours worked by the plaintiffs' lawyers, and the Hare Wynn and North firms chose not to comply with that portion of the order. They did not submit the affidavits of hours worked that Judge Wynn had ordered (R685-87, 689, 813), and they did not correct the statement in the Selinger/Cauley Joint Affidavit that <u>all</u> Plaintiffs' Counsel <u>had</u> submitted such affidavits (R687-88, 816). Whether or not the May 10 Order was actually directed to the Hare Wynn or North firms,[21] it is indisputable that the firms received the bulk of a $2.5M fee based, in part, on an inaccurate statement to Judge Wynn as to what had been submitted – an untrue statement the firms made no effort to correct. The Hare Wynn and North firms cannot credibly chastise Defendants for allegedly failing to comply with this order when they ignored it themselves.

That Hare Wynn/North were not settlement counsel (see C5764) is beside the point. The May 10 order requested affidavits describing the work of all "attorneys and paralegals involved herein," not merely settlement counsel, and settlement counsel passed that directive on to all plaintiffs' counsel. Plaintiffs must argue for a broad interpretation of the May 10 Order to charge Defendants with violating it;[22] they cannot do so while simultaneously arguing for a narrow interpretation to justify their own conduct.

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[21] The Hare Wynn and North firms were not listed as having been copied on the Order, but Steve Schulman, who was their co-counsel in the Lauriello I action, was listed.

[22] Plaintiffs assert, and Defendants dispute, that Defendants were among the "proponents" of the settlement to whom the Order was addressed.

B. The Trial Court Erred in Postponing the Determination of the Necessary-Witness Issue

Despite these many issues for which Messrs. Haley and Francis will serve as necessary witnesses for the defense, the trial court held the issue "premature" and "not ripe," because "[d]iscovery has not been completed" (C5764). As set forth above, however, there is plenty of evidence already in this record to back up Defendants' description of the issues they will raise, and testimony from Messrs. Haley and Francis will be needed to support Defendants' contentions. The issue is whether the class can be adequately represented by lawyers subject to such deficits (R885-87), and that is an issue that is squarely before the Court right now.

III

THE CONDUCT OF CLASS COUNSEL, BOTH IN 1998/1999 AND IN THIS ACTION, PRECLUDES THEIR ACTING AS CLASS COUNSEL HERE

A host of concerns regarding class counsel's conduct related to the underlying case and this case independently establish their inability to conduct this litigation.

A. The Hare Wynn and North Firms Did Not Fulfill Their Duties to the Settlement Class

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

As the trial court held:

> [T]he Hare Wynn and North Firms owed a fiduciary duty to all alleged class members in the 1998 MedPartners Securities 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." (C5758) (emphasis added).

Accord 3 Newberg on Class Actions §7:28 (4th ed. 2002). Plaintiffs' expert agreed that these responsibilities endured through July 10, 1999, when Judge Wynn issued his Order and Final Judgment (D(Rubenstein)138-39), and both sides' experts agreed that the firms had a duty to the class to ensure the settlement was fair even though Lauriello I had been dismissed and was on appeal (R405-06; D (Pearson)30-31, 222-23; S2780 ¶4.1).

Plaintiffs' alleged claims here are predicated on the assertion that the plaintiffs' lawyers in the 1998 Litigation were deceived. Plaintiffs have thus made the conduct and diligence of the plaintiffs' lawyers in the 1998 Litigation a central issue in the case. Any such lawyers seeking to represent the putative class here will necessarily be constrained in their advocacy for this class because of what they did or failed to do in 1998 and 1999.

That is especially true for the Hare Wynn and North Firms, since the facts readily demonstrate that they did not do the work necessary to evaluate the adequacy of the settlement. They did not ask any of their plaintiffs' counsel colleagues any questions about insurance, much less ask whether anyone had obtained the policies (R617, 626, 719-20, 724, 743). They did not ask for confirmatory discovery (R617-18, 724-25), or ask if anyone else had conducted any (R618, 726-27). They did not monitor MedPartners' public filings and disclosures during the litigation (R733-36, 753-54; S623-24), notwithstanding that they concede that it is a good practice for plaintiffs' securities lawyers to do so (S759-60). They did not ask or press for details on anything at all - except their share of the attorneys' fees.

Nevertheless, the trial court found three considerations determinative in concluding that Hare Wynn/North breached no duty to the 1999 class: (i) they were "severely limited in what steps they could take to discover the amount of insurance available to the class" because Lauri-ello I had been dismissed and was on appeal, (ii) they were "never appointed class counsel," and, (iii) in the court's view, "Defendants were not going to reveal the amount of insurance" in any event (C5758-59). All three conclusions conflict with the undisputed facts before the trial court.

Confirmatory discovery is routinely permitted in class actions that settle while a case is on appeal, see, e.g., In re Ins. Brokerage Antitrust Litig., 2009 WL 411877, at *7 (D.N.J. 2009); In re Merrill Lynch & Co. Research Reports Sec. Litig., 2007 WL 313474, at *16 (S.D.N.Y. 2007); In re Bristol-Myers Squibb Sec. Litig., 361 F.Supp.2d 229, 235 (S.D.N.Y. 2005), and that Hare Wynn/North were not appointed class counsel did not preclude them from taking such discovery. Mr. Somerville testified that he has personally performed significant confirmatory discovery in a class action in which he was not class counsel (R1043-45), and Mr. Francis conceded that Hare Wynn/North had both the right under the JPA to insist that Milberg do whatever confirmatory discovery was needed and the leverage under the Settlement Agreement to ensure that their request was satisfied (R716).

The trial court's holding that it was "certain that Defendants were not going to reveal the amount of insurance obtained during the pendency of the 1998 class actions" is, first, a premature holding on a hotly contested factual issue on the merits and, thus, a flatly impermissible basis for certification under Rule 23. See Mayflower v. Thomas, 894 So.2d at 641 (vacating certification where trial court "evaluate[d] the merits of several of the plaintiffs' claims"); Allstate Ins. Co. v. Ware, 824 So.2d 739, 744 (Ala. 2002)("[A] court deciding the issue of the propriety of class certification does not base the decision on the factual merits of the alleged class claims.").

The court's speculation is indisputably wrong in any event. As Defendants' expert testified – and as is no more than common sense – plaintiffs' counsel could have made sure they knew about the excess insurance no matter what Defendants' desires were:

> If anybody had made a request to see the policy alluded to in the press releases and in the securities filings, you either get a copy of the policy or you don't.
>
> There isn't any issue of credibility about that, it's either there or it's not there. And if MedPartners says: We're not going to produce this or simply refuses to produce it, then you've got options, sanctions, or you can just simply back out of

> the settlement negotiations and go back to square one.
>
> But you're going to find a copy of that policy, because it appears to have existed, and there are ways to get it if you really want to get it.
>
> So there's no doubt about your ability to get it. (D (Pearson) 72-73)[23]

2. Defendants Are Not Estopped from Arguing That the Hare Wynn and North Firms Did Not Fulfill Their Duties to the Settlement Class

The trial court erred in holding that "Defendants are estopped from arguing that the Hare Wynn and North firms were negligent in the settlement of the 1999 class actions" (C5759). Judicial estoppel has no application here.

First, contrary to the court's finding that "[a]ll Defendants were joint proponents of the 1999 class settlement" (id.), the AIG Defendants never asserted any position regarding the settlement class in that judicial proceeding. Although some of them signed the Stipulation of Settlement and funded the settlement, none of the AIG Defendants was ever a party in the underlying litigation, let alone joined a motion to approve the settlement (S651-52, 656-57). As such, the AIG Defendants are not judicially estopped from

[23] MedPartners' lenders did ask for, and did get, a copy of the AISLIC Policy no later than January 15, 1999, as MedPartners publicly disclosed in its Form 8-K filed on that date (S1826-27).

taking <u>any</u> position regarding the adequacy of the Hare Wynn and North firms. <u>See</u> <u>Selzer Auto., L.P. v. Cumberland Plastic Sys., LLC</u>, 70 So.3d 272, 276 (Ala. 2010) (judicial estoppel applies only when "there is (1) a prior judicial or quasi-judicial proceeding (2) in which <u>a party</u> successfully asserted a position") (emphasis added); <u>accord</u> <u>Transamerica Leasing, Inc., v. Inst. of London Underwriters</u>, 430 F.3d 1326, 1336 n.8 (11th Cir. 2005) (judicial estoppel "only applies to a party that actually made a prior inconsistent statement").

Additionally, with respect to Caremark (and the AIG Defendants, if judicial estoppel is held to apply to them), the estoppel that this Court previously found does not bar a challenge to the Hare Wynn and North firms' adequacy here. In 2006, this Court held that "Caremark is judicially estopped to now challenge the existence of a validly certified class, as recognized in the MedPartners securities litigation," because "[t]he propriety of <u>that</u> certification has been resolved and is not subject to debate." 956 So.2d at 1126 n.4 (emphasis added). To challenge the adequacy of the Hare Wynn and North firms, as Caremark does, is to challenge their ability to represent <u>this</u>

class, not the existence of a validly certified class in 1999. By conflating the two, the trial court once again ignored the central holding of Ex parte Caremark: this case involves different parties and "newly asserted claims," requiring a rigorous analysis independent of that in the underlying litigation. See id. at 1125-26.[24]

Judicial estoppel is also inapplicable because the inadequacy arguments made here are entirely consistent with the positions taken in the underlying litigation. Defendants' position has always been that the settlement in the 1998 Litigation was fair, entirely independent of the amount of insurance available. From Defendants' standpoint, therefore, the 1999 settlement class was appropriately certified (and the settlement approved) regardless of whether settlement counsel or any of the other plaintiffs' lawyers thoroughly investigated insurance.

[24] Other courts have rejected the theory that the trial court adopted. See, e.g., In re Yahoo! Litig., 251 F.R.D. 459, 465 (C.D.Cal. 2008) ("[Defendant] did not adopt an inconsistent position in stipulating to the settlement class in [prior suit] because this class involved different parties and different claims.") (emphasis added); Cohen v. Blockbuster Entm't, Inc., 878 N.E.2d 132, 138 (Ill.App. 2007) ("[T]he current ... class claims specifically cover new allegations that were not and could not have been covered by the [prior suit's] settlement class"). This Court should do the same.

Here it is the Plaintiffs, not the Defendants, who claim that MedPartners' insurance coverage was at the center of the 1999 settlement. Defendants' response is merely the converse and in no way inconsistent with the position advanced in the 1998 Litigation: **If** insurance were so all-fired important, then plaintiffs' counsel, including Hare Wynn/North, could not have fulfilled their duties to the class without investigating the extent of that insurance, which they admittedly did not. This response does not alter Defendants' core argument that the settlement in 1999 was fair and that the 1999 settlement class could therefore be certified.

3. Hare Wynn/North's Fee Splits in the Underlying Action Violated the Rules of Professional Conduct

a. *Hare Wynn/North's Fee Split with Their Client Violated Rule 5.4(a)*

The Hare Wynn and North firms' decision to take a portion of the attorneys' fees awarded by the court in 1999 and pay their client 30 times his allowed distribution from the settlement fund violated Rule 5.4(a) of the Alabama Rules of Professional Conduct, which says that "[a] lawyer or law firm shall not share legal fees with a non-lawyer." This prohibition is especially appropriate in a class action, where any extra compensation to a named plaintiff must be approved separately by the court. See Holmes v. Continental Can Co., 706 F.2d 1144, 1147-48 (11th Cir. 1983).[25]

The payment cannot be fairly characterized as a "reduction" of their fee, a characterization foisted upon the trial court by Plaintiffs and ultimately accepted (C5760). Lauriello was charged no fee; there was nothing to reduce. The Hare Wynn/North fee was taken out of the recovery of the class and the Blankenship plaintiffs, and any "reduction" could only have entailed a return of funds to them, not (as was done) a payment over to Mr. Lauriello. One cannot avoid the prohibition against fee sharing under Alabama law simply by re-labeling it as a fee reduction. See Alabama State Bar Office of General Counsel Opinion No. 1995-02.

[25] Other attorneys in the 1998 Litigation understood that making such payments to their clients required court approval. Gene Cauley did apply for an "incentive award" on behalf of his client, Isabel Griffin, a TAPS plaintiff who was actively involved in the litigation and who sat for her deposition while her husband was dying of cancer (S506-07; R661-62, 803-04). The $25,000 she received was less than a third of the amount received by Mr. Lauriello, a common stock plaintiff who had done nothing after his Complaint was filed to benefit the class.

b. ***<u>Hare Wynn/North's Fee Split with Milberg Violated Rule 1.5(e)</u>***

By insisting on and accepting a share of the fees in <u>Blankenship</u>, where they did no work, the Hare Wynn and North firms created additional issues regarding their conduct that will have to be defended. Rule 1.5(e) of the Alabama Rules of Professional Conduct states:

> 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.

Here the <u>Blankenship</u> fee is impermissible for three reasons: it does not satisfy any part of (e)(1), and it fails both (e)(2) and (e)(3).

As to (e)(1), Hare Wynn/North performed <u>no</u> services in connection with <u>Blankenship</u>, there was no written agreement between Hare Wynn/North and the Blankenship plaintiffs that Hare Wynn/North would assume joint responsibility with Milberg for the representation, and Hare Wynn/North did not refer the Blankenship plaintiffs to Milberg. Subparagraphs (2) and (3) are likewise not satisfied because the Blankenship plaintiffs neither were advised of nor consented to Hare Wynn/North's participation in their case or the fee split.

The trial court's apparent conclusion that this was a permissible referral fee (C5761) cannot be squared with the language of the JPA.[26] In any event, Messrs. Haley and Francis could not have "referred" actions they did not even know existed (R651-52, 771-72), and they admitted at the hearing that they had not done so (R653, 796).[27] Like their decision to split their fee with their client, Hare

[26] The JPA says nothing about referrals but says cases shall be "jointly supervise[d] and manage[d]" by Hare Wynn/North and Milberg (S2236 ¶ 1).

[27] The holding below that it was for Milberg to make sure the Blankenship plaintiffs consented to the fee split was error: all counsel involved have the duty. Kosinski v. Mason, 2001 WL 1511543, at *2 n.2 (Mich.App. 2001); Saggese v. Kelley, 837 N.E.2d 699, 706 (Mass. 2005). The conclusion that the agreement between Milberg and the Blankenship plaintiffs provided the necessary client consent was likewise wrong. The identity of "all the lawyers involved" should be disclosed. Kosinski, 2001 WL 1511543, at *2 & n.2.

Wynn/North's impermissible fee arrangement with Milberg raises serious questions as to their conduct and precludes a finding that they are adequate class counsel here.

B. Class Counsel Have Demonstrated Their Inadequacy in This Case

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

Rule 1.7(a) bars a lawyer from representing a client "if the representation of that client will be directly adverse to another client," and the comment to the rule makes clear that it "prohibits representation of opposing parties in litigation." On March 19, 2007, the Intervenors named John Lauriello as a defendant in their Class Action Complaint in Intervention (CA2304 ¶17), asserting that he breached his duties to the class in the settlement of the 1998 Litigation (CA2325 ¶¶67-70). From that date until March 23, 2009, when the Intervenors voluntarily dismissed their claims against Lauriello (C1129), the lawyers now appointed as class counsel represented Lauriello as a <u>defendant</u> in this case while at the same time seeking to represent the putative class that was suing him (R828, 971-72).

The trial court held that this readily apparent violation of Rule 1.7(a) did not render these lawyers inadequate as class counsel on three bases: (i) "Defendants' argument is MOOT"; (ii) "the claims against John Lauriello never had any merit"; and (iii) "the dismissal of John Lauriello was in the best interest in the class" (C5763). Each basis is wrong.

That counsel no longer represent a defendant cannot erase the fact that they violated Rule 1.7(a) for two full years. This violation "creates a serious doubt that counsel will represent the class loyally" and thus "requires denial of class certification." Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011). The court may not ignore counsel's conduct simply because it was completed sometime before the adequacy inquiry. See, e.g., In re Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. 485, 489-91 (D.Md. 1982).

The court's assessment of the Intervenors' claims against Lauriello as meritless is both belied by its own denial (CA3624-26) of Lauriello's merits-based motion to dismiss (see S3420-24) and irrelevant because the merit of a claim has no bearing on whether a lawyer can be on both sides of it. Representing opposing parties in the same case simply is prohibited by Rule 1.7 — regardless of the strength of the parties' claims and defenses.

Finally, the court's finding that "the dismissal of John Lauriello was in the best interest of the class" conflates the interests of counsel - who wanted to stop the Intervenors' challenge to their adequacy - and those of the putative class. It is also contrary to this Court's decision that "justice may not be attained if intervention is not allowed," 956 So.2d at 1129 — i.e., that the Intervenors' interests were protective of, not adverse to, the interests of the class. Counsel's efforts to preserve their own position in this case by extinguishing claims this Court held needed to be fully vetted cannot possibly be seen as furthering the interests of the putative class.

2. The Lead Counsel Agreement Sacrifices the Interests of the Putative Class

Counsel further established their inadequacy to represent the putative class by entering into a "Lead Counsel Agreement" with counsel for the Intervenors Lanny Vines, in which Intervenors consented to class counsel's adequacy and, it was understood, agreed to dismiss, with prejudice, all claims against Mr. Lauriello (D(Vines)192; R827-28)).

The agreement was reached on February 25, 2009 (C1099), less than three weeks after the lawyer factions had argued motions to disqualify one another (C7765-92, 807-23). The concrete loss to the putative class of the dismissal of a solvent defendant who had lost a motion to dismiss was secured in exchange for no benefit at all to the class (R829-30, 935-36; D(Vines)201). Rather, all the benefit went to the lawyers: The cross-motions to disqualify were withdrawn (S1323 ¶¶4-5), and class counsel promised not to object to Mr. Vines's petition for up to 7.5% of any attorneys' fees (R665-66; S1321-24 ¶¶1, 6).

The trial court blessed the Lead Counsel Agreement, again determining it to be "in the best interest of the class" (C5764). Ignoring reality, the court denied that the Agreement "restricted [Intervenors'] activities in any way."[28] The court also (and equally incredibly) denied that

[28] Entirely apart from giving up what he had previously represented to this Court and the trial court was the sole purpose of the intervention - the challenge to the adequacy of Lauriello and his counsel (CA1393; Brief for Appellant in No. 1040977 at 37, 55 - Mr. Vines is not allowed to pursue any discovery without first getting the approval of class counsel (R825, S1324-25 ¶8), and Defendants are not even required to respond to motions or other papers he files without an express order from the Court (S1322 ¶2(ix)).

the agreement "provide[s] for a fee split,"[29] and it put its full faith in Intervenors' counsel to have let the court know if there had been any "foul play" (id.).

It is perhaps understandable that Intervenors' counsel, having secured a fee arrangement, told the trial court that all had been above board (see C5764), but the alacrity with which the trial court accepted these bald assurances is surprising in light of Intervenors' counsel's new embrace of arguments he had previously described as "[t]ruly amazing and incredible, flatly outrageous, absurd, incomprehensible, disingenuous, preposterous, wild, unfounded, and utter nonsense" (D(Vines)114-15). Counsel's multiple about-faces upon entering into the Lead Counsel Agreement are collected at C5650-55. Not one of them was based on any change in the underlying facts.

The theme of plaintiffs' counsel who have raised awkward questions going silent after being cut in on fees is a

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[29] Class counsel and Intervenors' counsel mutually promised "to expressly advance and support" class counsel's petition for up to 92.5% of any fees awarded and Intervenors' counsel's petition for up to 7.5% of them (S1323-24 ¶6). That the court has final say over the propriety of attorneys' fees does not change the fact that the lawyers have preordained what will be requested no matter what happens in the future.

persistent one. It happened with Toll/Squitieri in 1999, and it happened here. All this demonstrates yet again the validity of Professor Morgan's observation (R903) that "when the issues of the class'[s] interests in full representation or full development of their best case runs up against the interests of [class counsel] in not really getting into those matters in which they were involved ... the solution to the problem becomes to sacrifice the interests of the class."

IV

THE CLASS AS CERTIFIED IS IMPERMISSIBLY BROAD

The class is impermissibly broad on two counts. The current class definition includes (i) individuals whose claims in the 1998 Litigation were based on their ownership of MedPartners TAPS securities or their participation in the Talbert tender offer and (ii) individuals who never submitted claims in the 1998 Litigation (C5777). All of the class representatives, however, are common shareholders who did submit claims. As a result, the class representatives fail Rule 23's adequacy and typicality requirements as to both non-common-shareholders and non-claimants.

A. The Named Plaintiffs, All Members of the Common Stock/Options Subclass, Cannot Represent Members of the TAPS or Tender Offer Subclasses

The class certified here, like the class in the 1998 Litigation, contains three distinct groups: common stock, TAPS, and Talbert tender offer participants (C5777). Contrary to the court's finding that the fraud claims at issue here "are common to each and every class member" (C5756), the claims in fact vary significantly among the subclasses. These differences, in turn, create conflicts between the class representatives and absent class members who belong to the TAPS and tender offer subclasses, rendering the representatives inadequate and their claims atypical under Rules 23(a)(3) and 23(a)(4).

The adequacy requirement in Rule 23(a)(4) "foreclose[s] the class action where there is a conflict of interest between the named plaintiff and members of the putative class." Cutler v. Orkin Exterminating Co., 770 So.2d 67, 71 (Ala. 2000); see also Ex parte GEICO, 729 So.2d at 309. Where the issues of law and fact that will confront the named plaintiffs differ significantly from those that will confront putative class members, the potential conflict means that the named plaintiff may not adequately represent the class members. See Cutler, 770 So.2d at 71.

Here, Defendants are entitled to argue that Plaintiffs did not suffer any damages – an essential element of their fraud claim – due to weaknesses in their underlying securities cases, and the three distinct subgroups of the putative class have different abilities to respond to this argument. Common shareholders are weakest in this respect, as they have a higher burden of proof than the other subclasses[30] and had a case (Lauriello I) already dismissed by motion in the underlying matter. TAPS and Talbert class members have the incentive to highlight this weakness so as to maximize their portion of any recovery, while common shareholders have every reason to hide it.

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[30] Most of the common stock actions were based on alleged violations of Exchange Act Section 10(b) and Rule 10b-5, while all of the TAPS actions alleged violations of Section 11 of the Securities Act of 1933. Only a Section 10(b) plaintiff must prove scienter. Compare Ross v. Bank South, N.A., 885 F.2d 723, 730 n.10 (11th Cir. 1989) (Section 10(b)), cert. denied, 495 U.S. 905 (1990), with APA Excelsior III L.P. v. Premiere Techs., Inc., 476 F.3d 1261, 1271 (11th Cir. 2007) (Section 11). Additionally, loss causation is an element only of a Section 10(b) claim. Compare Robbins v. Koger Properties, Inc., 116 F.3d 1441, 1447 (11th Cir. 1997) (Section 10(b)), with Thompson v. RelationServe Media, Inc., 610 F.3d 628, 675 n.65 (11th Cir. 2010) (Section 11).

These differences create an inherent conflict that requires each group to have separate representation to execute – or at the very least consider – alternative strategies. That is why the 1998 Litigation had different class representatives and different counsel representing the different subclasses. Because class representatives here are all former common stockholders, they cannot under Rule 23(a)(4) adequately represent a class that includes TAPS holders and Talbert claimants.[31]

The trial court held that this problem could be "resolved" by maintaining the allocation percentages from the 1999 settlement (C5756). But an allocation that made sense in a $56 million settlement is not automatically right for a case seeking more. The court's "resolution" could result in TAPS and Talbert plaintiffs receiving more than 100% of their losses, an obviously untenable result.[32]

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[31] The lack of TAPS or Talbert class representatives also creates fatal typicality problems under Rule 23(a)(3). See, e.g., Buus v. WAMU Pension Plan, 251 F.R.D. 578, 585 (W.D.Wash. 2008); In re Currency Conversion Fee Antitrust Litig., 361 F.Supp.2d 237, 247 (S.D.N.Y. 2005); Whittum v. Saginaw Cnty., 2004 WL 768901, at *1 (E.D.Mich. 2004); Agostino v. Quest Diagnostics Inc., 256 F.R.D. 437, 472 (D.N.J. 2009).

[32] Under the 1999 allocation plan, each of the three subclasses was allocated a certain fraction of their loss as

Footnote continued on next page.

This fact leads to at least two conclusions. First, that this supposedly unitary class so easily breaks into pieces **by itself** debunks the court's theory of the class as an entity. The class does not "sink or swim" together, as Plaintiffs contend (R129). Rather, it has component parts, and one part might enjoy a windfall while the other might not even come close to recovering its alleged damages. Second, it is certain that their inherent intra-class conflicts will surface in this case. The named plaintiffs have absolutely no incentive to advocate for outcomes that benefit TAPS or tender offer members. Indeed, they have no incentive even to consider those outcomes. Accordingly, they are inadequate to represent the class as certified.

Footnote continued from previous page.

calculated by the claims administrator (C5735 (S2331-35 ¶¶5,7; D(Joaquin)23-24)). Common shareholders recovered about 3% of their "Recognized Loss," TAPS members recovered approximately 29%, and Talbert members recovered approximately 47% (S2335 ¶7). Plaintiffs claim that they have suffered over $3 billion in damages in this case, over fifty times the original settlement (CA1007-08 ¶¶82, 86). Suppose – against the merits – Plaintiffs ultimately succeed in this case. If their recovery exceeds $62M, then each member of the tender offer subclass will, under the pre-existing allocation plan, receive an amount that, when combined with his/her original recovery **exceeds 100% of that class member's actual damages** (C5736). If the recovery reaches $134.2M, so will each member of the TAPS class (id.).

B. The Named Plaintiffs Cannot Represent Former Class Members Who Never Filed a Claim

In addition to being members of the common stock subclass, the class representatives here were all claimants in the 1999 settlement (S2532-33, 2622-24, 2637-38). The class as certified, however, includes individuals who did not submit claims in the 1998 Litigation (C5777).[33] The trial court failed to address this issue.

First, there is a clear conflict between claimants and non-claimants. Those who elected not to file claims in the 1998 Litigation would not be entitled to any recovery here, even if actionable misrepresentations or suppressions were to be shown. Non-claimants did not rely on any misrepresentation or suppression, even through class counsel, and they suffered no injury caused by a misrepresentation or suppression. Their lack of recovery in the settlement is due to their own choice or inaction. In any settlement negotiation, claimants would have every incentive to seize on this lack of claim and try to exclude non-claimants from

[33] The settlement administrator mailed 78,751 copies of the settlement notices and received 23,520 claims, of which 17,904 were accepted. Even given redundancies in the notices mailed (D(Joaquin)20-21), there were plainly many class members who simply chose not to claim.

any recovery, whereas, of course, non-claimants have an interest in maximizing their recovery.

Even if it might be possible for a non-claimant putative class member to overcome the lack of injury and reliance, any basis for doing so must relate to facts peculiar to that individual. This is demonstrated by the testimony of Virginia Hoffman, one of the intervenor plaintiffs, who asserted that both she and intervenor-plaintiff Frank McArthur did not submit claims in the underlying action, not because of any alleged misrepresentation or suppression, but because they never received notice of the settlement at all (D(Hoffman)91-95). If any non-claimant has a claim in this action, it is not on a basis on which anyone else does.

CONCLUSION

The Order on Motion for Class Certification is due to be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of June, 2013, a true and correct copy of the foregoing was served on counsel of record electronically as indicated below. It is further certified that the filing party will mail hard copies of the e-filed document to the Alabama Supreme Court by regular US mail within 24 hours of e-filing the document, along with a copy of the transaction confirmation.

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