IN THE SUPREME COURT OF MISSOURI

STATE *ex rel.* UNION PLANTERS BANK, N.A.; MARSHALL & STEVENS, INC.; ROBERT CHLEBOWSKI; LYNNE FROWNFELTER; MICHAEL J. DOSTER; and DOSTER, JAMES, HUTCHINSON & ULLOM, P.C.,	)	
Relators,	)	Supreme Court No. SC85473
vs.	)	
THE HONORABLE LARRY L. KENDRICK, Circuit Judge, Division No. 17, Circuit Court of St. Louis County,	)	
Respondent.	)	

ORIGINAL PROCEEDING ON
PETITION FOR A WRIT OF PROHIBITION

PLAINTIFFS' BRIEF ON BEHALF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This action involves a request by Relators, who are defendants in a class action pending in the Circuit Court for St. Louis County, that this Court issue an extraordinary, original, remedial writ of prohibition, preventing Respondent (Hon. Larry L. Kendrick) from enforcing his Order granting class certification. Judge Kendrick entered the challenged Order following an evidentiary hearing, extensive briefing and oral argument. Relators initially sought a writ of prohibition in the Missouri Court of Appeals, Eastern District, and that court summarily denied the writ petition without a response being filed. This Court has jurisdiction of the instant writ petition pursuant to Article V, § 4 of the Missouri Constitution.

STATEMENT OF FACTS

Relators' petition for a writ of prohibition arises out of an action brought in the Circuit Court for St. Louis County (Hon. Larry L. Kendrick) by eight holders of Arch Leasing Collateral Trust Bonds, on behalf of themselves and a class of approximately 650 similarly situated bondholders. Plaintiffs seek to recover in excess of $15 million in losses and damages suffered when the bonds went into default. Plaintiffs are pursuing sixteen causes of action against six named defendants, based upon defendants' failures to perform various duties in connection with the issuance of the bonds, the operation of the bond program and the default.

In their writ petition, Relators – the defendants below – seek to second guess strategic decisions made by the named plaintiffs and their counsel to accept information, documents and financial assistance from certain third parties to facilitate pursuit of their claims. Relators further seek to second guess Judge Kendrick's decision to certify the class – made after an evidentiary hearing, extensive briefing and oral argument.

Background

During and prior to the spring of 1995, a group including Robert Chlebowski, Lynn Frownfelter, Michael Doster and his law firm – all of whom are defendants below and relators here – formulated and implemented a plan to issue collateralized trust bonds for purposes of raising capital to pursue a computer equipment leasing venture. The plan was embodied in a prospectus relating to the bonds, which became effective April 13,

1995 (the "Prospectus"). Second Amended Class Petition (hereafter "SACP"), appended to the Petition for Writ of Prohibition as Exhibit B, ¶ 20.

Chlebowski and Frownfelter, and entities they controlled, previously had engaged in a similar business, utilizing funds from investors in investment programs known as the "Arch Funds." They had not previously utilized collateralized trust bonds. As of the spring of 1995, some of the Arch Fund programs were still ongoing and various of the investors had not yet been fully repaid. SACP, ¶ 21.

Under the plan and Prospectus relating to tbe bonds, an entity known as the Arch Leasing Corporation Trust (hereafter "ALCT" or the "Trust") would acquire computer equipment, utilizing proceeds from the sale of the bonds as well as funds borrowed from banks (the "Bank Debt"), and would lease the equipment to third parties. The lease payments were to be used to pay the Bank Debt and other expenses, and monies generated in respect of the value of the equipment at the end of the lease terms (the "Residual Values") would be used to repay the bonds. The bonds were to be fully collateralized and secured by the computer equipment. SACP, ¶ 22.

To help ensure that the Residual Values of the equipment at the end of the lease terms would be sufficient to repay the bonds, the plan and Prospectus provided that ALCT would obtain independent third-party appraisals of the equipment from a professional appraiser in setting the Residual Values. In that regard, the Prospectus expressly stated:

> The anticipated value of the Equipment upon termination of a related Lease ("Residual Value") will be determined by a qualified, unaffiliated appraisal firm at the inception of such Lease.

SACP, ¶ 23. Defendant Marshall & Stevens, Inc was engaged to perform the appraisals. SACP, ¶ 86.

The bond program, as well as the Arch Funds program, were carried out through a series of entities controlled by Chlebowski and Frownfelter: Arch Management Corporation, a Missouri corporation which served as Managing Trustee of ALCT and managed its business operations; Arch Leasing Corporation, a Missouri corporation which was the parent company of Arch Management Corporation and was to administer the leases; and St. Louis Leasing Corporation, a Missouri corporation which was to provide lease brokerage services to ALCT and remarket leased equipment. SACP, ¶ 24.

Defendant Union Planters Bank, N.A. (the "Bank"), formerly known as Magna Bank, served as the Indenture Trustee for the bonds under an Indenture dated January 31, 1995. SACP, ¶ 25. In that capacity, the Bank was to make sure that certain requirements were met before the bonds were issued, authenticated and delivered; control the flow of funds; and otherwise act as a watchdog over the bond program. Specifically, the Bank was required to authenticate and certify the bonds before they could be validly issued, and could not properly do so if ALCT was in default of any of its obligations (SACP, ¶¶ 51-53, 58-61); upon an event of default, the Bank was required to exercise its rights and powers to remedy same, and exercise an appropriate degree of care and skill in so doing (SACP, ¶¶ 45-46); the Bank was to collect all funds received as payments pursuant to the

Equipment leases or as liquidation proceeds, and exercise sole dominion and control over those funds (SACP, ¶¶ 144–54); and the Bank was required to obtain Certificates of Fair Value relating to the Residual Values of the equipment before the authentication and delivery of the bonds (SACP, ¶¶ 197-210).

Between April and November, 1995, ALCT issued approximately $14 million of bonds, known as the Series 1 Collateral Trust Bonds (the "Bonds"), and received proceeds in that amount. SACP, ¶¶ 1, 26.

The first maturity date for the Bonds was scheduled to occur on May 19, 1998. On that date, $1,533,000 in principal was to be paid to certain bondholders. Before that date, it became apparent that insufficient monies would be realized from the equipment collateralizing the Bonds to fully repay them. SACP, ¶ 27.

On May 18, 1998, ALCT initiated an equitable action in the Circuit Court for St. Louis County (Hon. Patrick L. Clifford), No. 98 CC-1702 (hereafter the "Equity Action"). ALCT sought to compel the Bank, as Indenture Trustee, to distribute available funds to all bondholders on a *pro rata* basis, rather than paying in full the first Bonds to mature – which would leave insufficient funds to pay later maturing Bonds. Subsequently, the Bank filed a counterclaim for instructions. SACP, ¶ 28.

On June 11, 1998, the Bank issued written notice declaring a default under § 6.02 of the Indenture, on grounds that the principal payment due on the Bonds maturing May 19, 1998 had not been paid. As a result, the principal due date of all Bonds then outstanding was accelerated. SACP, ¶ 29.

Ultimately, the Equity Action resulted in the available funds being distributed to bondholders on a *pro rata* basis. The Equity Action, and all distributions pursuant thereto, were concluded by 2002. The bondholders received approximately $5 million from the liquidation of collateral and other monies on hand. Thus, including lost interest – which was payable under the Bonds at a rate of 10.5 percent – the Bondholders have suffered losses and damages in excess of $15 million. SACP, ¶¶ 30-31; Relators' Brief (hereafter "Rel. Br."), p. 19.

Attempted Intervention in Equity Action

In August, 1998, three brokers for certain persons who had purchased Bonds – David Bax, William Glaser and William Meyer (hereafter the "Brokers") – asked Gerald Greiman and his then law firm (Dankenbring, Greiman, Osterholt & Hoffmann, P.C.) to represent the interests of bondholders in connection with an issue then being addressed in the Equity Action in proceedings before Judge Clifford. Plaintiff's Answer to Petition for a Writ of Prohibition, filed in this Court October 29, 2003 (hereafter "Writ Ans."), p. 9.

Specifically, it appeared that Chlebowski (represented by Doster) and the Bank were engaging in a collusive effort to sell the remaining leases and equipment held by ALCT, at a deep discount from their remaining income streams and residual values, to Varilease Corporation, a company which then employed Chlebowski, without any analysis or consideration as to whether a sale was in the best interests of the

bondholders.[1] The remaining leases and equipment represented the sole assets available to generate revenues to pay the principal and interest due on the Bonds. It appeared that the proposed sale would divert a substantial portion of the value in the remaining leases and equipment to Chlebowski and his new employer, to their benefit and the bondholders' detriment. Writ Ans., p. 9; Ex. 32, pp. 95-106.[2]

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[1] The Brokers and bondholders had not reached any conclusion that holding the portfolio, and thereby realizing the full income and sale proceeds stream, would be more advantageous than liquidating the portfolio for a lump sum, which would entail selling it a discount, with the buyer presumably assuming the risk of non-performing leases. What was of concern was that Chlebowski and the Bank apparently had agreed to engineer a sale of the portfolio to Chlebowski's new employer, without any analysis of whether a sale, as opposed to holding the portfolio, was in the bondholders' best interests. Exhibit 32 to Petition for Writ of Prohibition, pp. 99-104.

[2] Except where otherwise noted, exhibit citations in this brief, cited as "Ex.," refer to exhibits filed in this Court in support of or in opposition to the Petition for Writ of Prohibition.

Greiman and his law firm (hereafter collectively referred to as "SFBB")[3] filed a motion to intervene in the Equity Action on behalf of six specified bondholders, who had authorized them to do so. The work in that regard was performed on an hourly basis and was funded out of a $20,000 retainer that was paid by the Brokers. Ex. 32, p. 106, 114; Ex. 33, 210-11. Although the Bank, as Indenture Trustee, was supposed to be representing the interests of the bondholders, it sided with Chlebowski and Doster to oppose the bondholders' intervention in the Equity Action. Judge Clifford denied intervention, and the Bank, Doster and Chlebowski proceeded to effect a sale of the remaining leases to Varilease on a consent basis. Writ. Ans., pp. 8-9; Ex. 33, pp. 167-68.

The concerns underlying the bondholders' motion to intervene proved to be well-founded. The basis on which Chlebowski, Doster and the Bank urged the court to approve the sale was that it would transfer the risk of leases being non-performing to the buyer. Ultimately, however, Chlebowski, Doster, the Bank and Varilease structured the sale such that Varilease later was able to return non-performing leases to ALCT and receive a refund of $1.1 million of the price it had paid for the remaining leases and equipment, which represented 33 percent of the purchase price of $3.3 million. Writ. Ans., p. 9; Ex. 33, pp. 167-68.

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[3] The firm of Dankenbring, Greiman, Osterholt & Hoffmann, P.C. evolved into Dankenbring Greiman & Osterholt, LLP, which merged with Spencer Fane Britt & Browne LLP, effective January 1, 2001. Writ Ans., p. 7.

Exploration of Class Action

After the attempt to intervene in the Equity Action was rebuffed, SFBB, at the behest of the Brokers and the bondholders who had sought intervention, began to explore the possibility of bringing a class action on behalf of the bondholders to seek to recover their losses and damages arising from ALCT's impending default on the Bonds. The initial exploratory work was funded by the remaining retainer finds. SFBB proceeded to delve into the complicated facts and circumstances underlying the Bond program and default, in order to try to determine (1) what were the significant acts and omissions which led to the default, and who was responsible for them; (2) whether there were viable class action claims that could be asserted on behalf of the bondholders, and (3) if so, what were the economic terms on which the firm would be willing to undertake such an action. Writ. Ans., p. 9; Ex. 32, pp. 106-07, 113-20.

A pivotal challenge facing SFBB was to find knowledgeable sources of information regarding the Bond program and the default, and, in particular, knowledgeable sources who were willing to share the information they had. Obviously, Chlebowski, Doster and the Bank had a wealth of knowledge and information. However, they already had manifested their hostility to the bondholders by opposing their intervention in the Equity Action. Moreover, Chlebowski and the Bank were represented by counsel; accordingly, SFBB could communicate with them only through their counsel. Writ. Ans., pp. 9-10; Ex. 32, pp. 113-20.

SFBB initially looked to the Brokers for such information, and the assistance they provided was invaluable. The Brokers understood the structure of the Bond program and

how it was supposed to work. They provided various documents and information about individuals and entities involved. They provided valuable information that would not otherwise have been available to SFBB in its pre-filing investigation. Writ. Ans., pp. 9-10; Ex. 32, pp. 113-20.

For example, David Bax provided facts showing that Marshall & Stevens knew of its obligation to perform appraisals of the residual value of the leased computer equipment on an ongoing basis, but was not performing such appraisals. Instead, Ralph Page of Marshall & Stevens had told Bax that Marshall & Stevens intended to rubber-stamp one spreadsheet "appraisal" provided by Chlebowski after all the Bonds were sold. Writ. Ans., p. 10; Ex. 21, pp. 41-42; Ex. 34, pp. 19-20.

Similarly, William Glaser was instrumental in putting SFBB in contact with Mike Leary, the former chief financial officer of St. Louis Leasing, and in making Leary willing to voluntarily provide information. Leary provided key documents and information, including information enabling SFBB to deduce that Chlebowski improperly removed approximately $800,000 in cash from the Trust in early 1996, and that the Bank breached its duties in allowing that to happen. Ex. 32, pp. 116-17; SACP, Counts XI-XII.

SFBB considered from the start the ethical implications of its fees being paid by someone other than the bondholders; and concluded that there was no insurmountable impediment to going forward in that it felt that what was being pursued was very much in the interests of the bondholders, and it was permissible for clients to consent to such an arrangement after consultation. Ex. 32, p. 107.

SFBB also considered the practical implications of obtaining assistance from the Brokers to look at potential claims against others. As Greiman testified (Ex. 32, pp. 110-11):

> [W]e considered practicalities from a logical standpoint of starting down the road of getting assistance from the brokers to look at potential claims against others. We recognized that if we were getting assistance from certain parties there may be an impediment to assert claims against those parties. We recognized that in a bond deal like this, when it goes bad and there are losses, anybody who had anything to do with the bonds or the deal might potentially be a target or a defendant. We didn't want to get into a situation where we were obtaining assistance from, and precluded from asserting claims against people who were at the center of the thing, and the most culpable and solvent, potential defendants in order to pursue claims against people who were at the periphery, may not have good liability and may not be solvent.
>
> In looking at all that, we felt that the brokers were not very likely targets in a class action for a number of reasons. First of all, claims against them by bondholders would tend to turn on individual circumstances in communications, not on questions that turn on facts and legal issues that are common to the entire class . . . .

SFBB concluded that using the Brokers as allies, rather than adversaries, in the effort to recoup the bondholders' losses and damages would not be inimical to the bondholders' interests in that the Brokers were not a suitable target for class action

claims. Among other things: (1) any claims against the Brokers would focus upon issues of misrepresentation, non-disclosure and/or fraud in connection with the sale of the Bonds to each bondholder, and thus involve issues of individual reliance not appropriate for class treatment; (2) the Brokers and the bondholders to whom they sold Bonds were scattered around the country, and, thus, may not be subject to personal jurisdiction in one court; and (3) in the securities industry, Brokers and their customers typically enter into account agreements with arbitration provisions, and such arbitration agreements could complicate and/or defeat class certification. Ex. 32, pp. 108-14.

Involvement of Liss

It eventually became clear that more information, beyond what the Brokers knew, was needed; and Jerry Liss was identified as a potential source of additional information. Liss owned a brokerage firm in Milwaukee, J.E. Liss & Company, Inc., which had acted as the retail broker with respect to approximately one-third of the Bonds sold and also had acted as underwriter on the Bond program. Writ Ans., p. 10; Ex. 32, pp. 106-07, 113-20.

As with the Brokers, SFBB considered that Liss and his company (collectively, "Liss") were not ideal targets for class action claims in that, among other things: (1) Liss was the broker for approximately one-third of the Bonds sold, and claims against Liss for acts and omissions as a broker would involve individualized issues not appropriate for class treatment; (2) while claims against Liss as underwriter could turn on facts and theories common to all bondholders, it seemed likely that Liss had arbitration agreements with customers for whom it acted as broker, which might extend to underwriter-related

claims; and (3) joinder rules and prohibitions against splitting causes of action might have precluded bondholders from asserting only underwriter-related claims against Liss, without also asserting broker-related claims, or in the absence thereof, those claims being deemed waived. Further, Liss' company appearing to be a small, family-owned broker-dealer, it seemed questionable whether Liss would have the wherewithal to satisfy a judgment covering all or most of the bondholders' millions of dollars in damages. Ex. 32, pp. 121-28; Ex. 34, pp. 72-75.[4]

Liss turned out to have helpful information and was willing to share it. Liss provided information and documents regarding the operation of the Bond program, the cause of the Bond default and the potential liability of substantial and solvent defendants, including the Bank, a national institution with the unquestioned financial wherewithal to pay a multi-million dollar judgment, as well as Marshall & Stevens, a national appraisal firm. Writ Ans., pp. 10-11; Ex. 32, pp. 119-20, 127-28, 136-37.

As with the Brokers, the assistance and information received from Liss was invaluable. For example, SFBB learned from Liss that the Residual Values on which the Bonds were premised may have been unduly high and not based on actual experience that had been tracked in the past by Chlebowski's company. Ex. 32, pp. 119-20.

Further, Liss made it possible for SFBB to talk with and obtain information from Robert Phillip of the law firm Phillip & Kranitz, who acted as underwriter's and issuer's

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[4] The Brokers also seemed to be small operations that may not have the wherewithal to satisfy the kinds of losses and damages suffered by the bondholders. Ex. 32, pp. 112-13.

counsel in connection with the Bonds. Writ Ans., p. 6. Obviously, much of the information that Phillip had was privileged, and SFBB could not have gained access to such information from Phillip without the cooperation of Liss.

SFBB obtained from Phillip, among other things, critical information concerning the improper diversion, during 1995, of $3.6 million in Bond proceeds to purposes other than the purchase of computer equipment for lease. While SFBB had learned about the diversion from other sources, the crucial piece of the puzzle that Phillip added was that the Bank and Doster also knew about the diversion, in mid-July, 1995, but took no remedial action. Writ Ans. p. 6;[5] Ex. 32, pp. 136-37; Ex. 33, pp. 180-82; 220-22; Ex. 34, pp. 18-20.

Phillip related that he noticed an entry on an ALCT financial statement in mid-July, 1995, which caused him to question whether Bond proceeds had been improperly diverted. Phillip called Kent Schroeder of the Bank and raised the question. He assumed, in light of the Bank's duties to exercise sole dominion and control over the Bond proceeds and funds in ALCT's accounts, as well as the Bank's other duties as Indenture Trustee, that the Bank would address the issue. However, the only thing that happened was that Doster called Phillip and threatened to report him to the Wisconsin Bar if he directly contacted the Bank again. Writ Ans., p. 6; Ex. 32, pp. 136-37; Ex. 33, pp. 180-82, 220-21; Ex. 34, pp. 18-20.

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[5] The Writ Answer, at p. 6, line 3, refers to a date of "mid-July, 1999." The reference to "1999" is a typographical error, and should read "1995."

The foregoing information enabled SFBB to piece together the facts that the Bank and Doster had notice of the improper diversion of funds in mid-July, 1995, but took no remedial action. Instead, they continued to facilitate the issuance of Bonds, notwithstanding the fact that the diversion of funds should have been seen as a serious default of ALCT's obligations. The foregoing facts lie at the heart of various of the claims asserted in this action against the Bank and Doster and his law firm. *See* SACP, Counts I, II, IX and XV.

Status/Discussions as of December, 1998

On December 18, 1998, Greiman met with Liss and various of the Brokers, and discussed SFBB's investigation and its evaluation of a potential class action. Writ Ans., P. 11; Ex. 32, pp. 129-30.

Greiman testified that he had understood implicitly throughout his dealings with the Brokers and Liss that, in light of the assistance they were providing in the investigation, SFBB would not be in a position to turn around and sue them. Greiman assumed that the Brokers and Liss had made the same assumption. Writ Ans., p. 11; Ex. 32, pp. 114, 163.

At the meeting, Greiman acknowledged that because of the assistance they were providing, SFBB would not be in a position to pursue claims against the Brokers and Liss in a class action. However, he further made clear his understanding that the bondholders would remain free to pursue any claims against them through other means. Writ Ans., p. 11; Ex. 32, pp. 114, 129-34, 163.

In the December 18, 1998 meeting, Greiman told the Brokers and Liss that, based upon his evaluation, his then law firm – Dankenbring, Greiman, Osterholt & Hoffmann, P.C., comprised of approximately 15 lawyers – was not willing to bear the economic risk of pursuing a class action on behalf of the bondholders on a purely contingent basis, but would be willing to do so on a blended fee arrangement, under which the firm would require an initial $100,000 retainer to be used to pay hourly fees, and after that retainer was expended, would work on a purely contingent fee basis. Writ Ans., pp. 11-12; Ex. 32, pp. 130-34.

There was no discussion at the meeting about who would pay the retainer, much less any suggestion that the Brokers and Liss would be contributing to the retainer. To the contrary, Greiman assumed that the retainer would be paid by bondholders. *Id.*

After the December 18, 1998 meeting, and without any involvement on SFBB's part, Liss and the Brokers began to solicit and collect funds for the retainer from the bondholders. Liss sent a letter to all of the approximately 650 bondholders, and the Brokers contacted various bondholders as well. The Brokers and Liss were not able to raise the entire $100,000 retainer from the bondholders. As a result, in the spring of 1999, the Brokers and Liss decided that Liss would contribute the shortfall of approximately $65,000 to the retainer fund. Writ. Ans., p. 12; Ex. 32, pp. 131-32, 137-42.

Once the retainer had been raised in the spring of 1999, the Brokers began to assist SFBB in identifying bondholders interested in serving as class representatives. SFBB was dependent on information from the Brokers about the identities of bondholders

because the list of bondholders was not public. At one point, David Bax asked the Bank to provide a copy of the list, but the Bank refused. SFBB worked with the Brokers in identifying and contacting bondholders to serve as class representatives. Writ Ans., p. 12; Ex. 32, pp. 134-36, 178-79; Ex. 34, pp. 201-04.

Engagement Letters

Against this background, in July, 1999, SFBB formalized its engagement with the Plaintiffs. In an engagement letter dated July 6, 1999, SFBB outlined the financial arrangements concerning its representation and made clear that it would not be considering or pursuing claims against the parties providing assistance in connection with SFBB's efforts:

> I am writing in follow-up to your recent conversation with your broker to confirm the terms on which we have proposed to represent you, along with other holders of Arch Leasing Corporation Trust Series I Collateral Trust Bonds (the "Bonds"), in a class action lawsuit to be filed, which will seek to recover damages in respect of losses on the Bonds suffered by the bondholders.
>
> The suit will be brought against Union Planters National Bank, formerly known as Magna Trust Company ("Magna"), as Indenture Trustee, and such additional potentially culpable parties against whom we deem it appropriate to proceed. The additional parties may include Robert Chlebowski, Marshall & Stevens and Michael J. Doster, among others. . . .
>
> . . . .

At the outset of our representation, certain bondholders, as well as certain brokers involved in selling the Bonds, have contributed to a fund to pay certain of our fees and expenses as set forth above. That fund aggregates $120,000. Those proceeds have been deposited in our firm's trust account and will be used to pay our hourly fees and out-of-pocket expenses (as set forth above) as they are incurred. In the event we are successful in achieving a recovery in this case, the proceeds payable to the bondholders shall be applied first to reimburse the parties who contributed the funds comprising the fund described above.

Although, as noted above, certain third parties have contributed monies to fund this action, you and the other bondholders will be our sole clients in this matter, and our attorney-client duties will extend solely to you and the other bondholders. While the funding third parties will not be our clients, we expect to obtain ongoing assistance from them in pursuing your claims. Accordingly, it may be necessary at times to share privileged or otherwise confidential information with them, and we assume we have your approval to do so.[6] Similarly, in light of

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[6] Greiman testified that the foregoing language sought approval to share confidential information with Liss or the Brokers only where doing so would further the bondholders' interests, such as by enabling counsel to confirm or expand upon facts learned from other sources, and further testified that no privileged and confidential information has been shared with the Brokers and/or Liss. Writ Ans., pp. 10-20; Ex. 32, pp. 142-44.

the ongoing assistance we anticipate, as well as the funding they have contributed, we will not be in a position to consider or pursue any potential claims against any such parties or any entity with which any of them is affiliated. We assume this meets with your approval as well.

As is evident from the above, we will be representing not just your individual interests in this matter but the interests of the overall bondholders. From an individual's standpoint, there may be some advantages to having his or her own individual counsel, focusing solely on the individual's interest; and you always remain free to retain your own separate counsel. However, the fees and expenses associated with individual bondholders retaining their own separate counsel could be quite substantial, and there are obvious cost efficiencies to be achieved by bondholders pooling their resources and utilizing common counsel. We assume that you desire to use common counsel with the other bondholders and consent to our representing the class of bondholders.

Since we anticipate this being a class action on behalf of all persons who invested in the Bonds, the claims we can pursue in this case will be limited to claims which are common to all bondholders. To the extent that individual bondholders have claims which arise out of circumstances which are not common to all bondholders, we are not in a position to pursue those claims. Of course, bondholders are free to pursue those claims by other means.

Ex. 18. Each Bondholder agreed to the foregoing. Writ Ans., p. 15.

Subsequently, to make absolutely clear that no claims would be considered or pursued against Liss or the Brokers, SFBB sent another letter to the Plaintiffs on October 6, 1999, stating:

> Please find enclosed a draft petition that we have prepared, the filing of which would start the lawsuit. I would appreciate your reviewing the petition and letting me know whether it meets with your approval or of any questions you may have. We would like to file the petition by the end of next week. Accordingly, if at all possible, I would appreciate hearing from you by next Wednesday, October 13. Please feel free to telephone Dan Conlisk or me.
>
> I also wanted to follow-up on a point raised in our engagement letter, and which has come up in my conversations with some of you. As stated in the engagement letter, we are not in a position to consider or pursue any claims against various brokers involved in selling the bonds, including but not limited to J.E. Liss and Company, Inc., as they are assisting with this case and have provided some of the funding for it. I want to reiterate, however, that your participation in this lawsuit does not preclude you from considering or pursuing claims against such persons with other counsel. As I have advised some of you in our conversations, I am aware of a class action suit which has been filed in Wisconsin State Court against J.E. Liss and Company, Inc. and various individuals. I am enclosing for your information copies of the complaint and the answer and affirmative defenses filed in that case. I do not have any other information as to the status of that case.

Ex. 19.

The draft Petition enclosed with the letter did not include any claims against the Brokers or Liss. Writ Ans., p. 16.

The October 6, 1999 letter was prompted in part by discussions Greiman had with two bondholders, in which Liss' name had come up. Ex. 32, pp. 148-50. Also, in meetings with Plaintiffs regarding responses to written discovery requests, their depositions, and other aspects of this case, SFBB discussed the claims asserted against each Defendant, the role of each Defendant and SFBB's decision to accept help and financial support from, rather than sue, Liss and the Brokers. Thereafter, in the Plaintiffs' depositions, Relators' counsel repeatedly presented information suggesting culpability on the part of Liss and the Brokers and pressed Plaintiffs to reconsider the manner in which they had elected to proceed. Nevertheless, each Plaintiff re-affirmed the retention agreement. Writ Ans., pp. 25-26; Ex. 32, pp. 151-52; Exs. O-V to Bondholders' Suggestions in Opposition to Petition for a Writ of Prohibition filed in this Court (hereafter "Bondholders' Writ Opp.").

Filing and Conduct of Litigation

SFBB filed the original Class Action Petition in this case in November, 1999. The Petition asserted various claims, set forth in fifteen separate counts, against seven defendants. Ex. A.

Thereafter, the Petition was twice amended. The current operative pleading is the Second Amended Class Action Petition. Ex. B. The SACP asserts various claims against

seven defendants, spread over sixteen counts, which may be summarized as follows (Ex. B):

Count I:	claims against the Bank for violations of the Indenture relating to the improper use of Bond proceeds, based on the Bank's failing to take remedial action after learning of ALCT's improper use of Bond proceeds for purposes other than the acquisition of computer equipment for lease;
Count II:	claims against the Bank for improperly continuing to authenticate Bonds, thus enabling their issuance, after the Bank acquired knowledge that ALCT was in default of its obligations under the Indenture;
Count III:	claims against the Bank for certifying Bonds without the required opinion of counsel;
Count IV:	claims against the Bank for violations of the Indenture relating to its post-default dealings with lease residuals;
Counts V-VI:	claims against Chlebowski and Varilease[7] for conspiracy and breach of fiduciary duties in connection with their post-default dealings with lease residuals;

[7] Plaintiffs ceased pursuing claims against Defendant Varilease Corporation, since Varilease filed bankruptcy proceedings and the automatic stay provisions of the Bankruptcy Code precluded continued pursuit of this action against it.

Counts VII-VIII:	claims against Marshall & Stevens for negligence and breach of contract in providing only after-the-fact, rubber stamp approvals of Chlebowski's values, while allowing itself to be held out as providing bona fide professional appraisal services designed to ensure that equipment residual values would be adequate to pay off the Bonds;
Count IX:	claims against Doster and his law firm for negligence in issuing opinions of counsel, as a predicate to the issuance of the Bonds, that ALCT was not in default of any of its obligations, when Doster, in fact, had knowledge and information to the contrary;
Count X:	claims against Chlebowski and Frownfelter for misrepresentation and fraudulent concealment;
Count XI :	claims against Chlebowski for conversion, arising out of his removal of $800,000 from the Trust in early 1996;
Count XII:	claims against the Bank for breach of the Indenture and Basic Documents arising out its allowing and/or enabling Chlebowski to improperly withdraw $800,000 from the Trust in early 1996;
Count XIII – XIV:	claims against Chlebowski and Frownfelter for providing false officer's certifications;

Count XV: claims against Doster and his law firm for negligence in connection with the preparation of false officer's certifications; and

Count XVI: claims against the Bank, Chlebowski and Frownfelter for violating the Indenture by issuing the Bonds without first obtaining the requisite Certificates of Fair Value concerning the underlying collateral.

During the time that this litigation has been pending, SFBB has spent a great deal of time and effort litigating a number of motions brought by various Defendants, seeking dismissal of some of the claims asserted. To-date, SFBB, on behalf of Plaintiffs, has prevailed on every such motion that has been adjudicated. Writ Ans., pp. 20-21. Accordingly, at this juncture, sixteen viable claims remain, against a number of solvent defendants.

SFBB otherwise has spent a great deal of time and effort on work relating to this case. Such efforts have included pursuing extensive document discovery, taking or defending approximately 20 depositions, other factual investigation, extensive legal analysis, preparing and filing a number of motions to compel discovery, and litigating disputed matters relating to Varilease in bankruptcy court in New York. Ex. 32, pp. 89-90.

Overall, in addition to the time and expenses paid for by the retainer funds, SFBB, to-date, has devoted more than $400,000 in uncompensated attorney time to this case, and

has spent more than $35,000 in unreimbursed out-of-pocket expenses, in pursing a recovery for the bondholders. Writ Ans., p. 21.

As noted above, SFBB made strategic judgments, early on in its work in this matter, that it would be prudent to obtain inside information as to the Bond program and what caused the default, as opposed to simply filing a lawsuit without an adequate understanding of the pertinent facts and claims that could be asserted, and hoping that supporting information could be obtained through discovery. What has emerged during the course of discovery is that SFBB's strategic judgments were well-founded. To-date, Defendants Chlebowski and Frownfelter, who essentially controlled the Bond program, have asserted that they have virtually no documents regarding the Bonds, claiming that they turned them over to Varilease Corporation. In turn, Varilease, after filing for bankruptcy in New York, has asserted that it lost all of the documents that Plaintiffs requested. And the Doster Defendants have yet to produce a single sheet of paper, claiming that every document they have is privileged. Writ Ans., pp. 21-22.

Proceedings on Motion for Class Certification

In the trial court proceedings concerning Plaintiffs' motion for class certification, Relators had a full opportunity to explore, develop and present the facts and arguments on which they rely to contest class certification. Relators deposed Greiman on two occasions, the trial court held an evidentiary hearing spanning three days, the parties submitted exhaustive briefs on the issue, and the trial court heard extensive oral argument. Exs. 31-34; Docket Entries regarding trial court proceedings, included in the Appendix to this brief (hereafter "Appendix") at Tab 1.

The arguments raised by Relators in opposition to class certification did not involve circumstances in which a *client* was maintaining that there was inadequate consultation prior to the client's consent to limit the scope of the representation. Rather, Relators' arguments consisted of *litigation adversaries* attempting to escape liability for their own conduct by the tactic of asserting that the opposing parties and those parties' counsel inadequately consulted with one another. Writ Ans., p. 26.

In their arguments against class certification, Relators at no time demonstrated, or even asserted, that they have no culpability for the bondholders' losses and damages. Rather, the main thrust of their position was that there may be an additional culpable party, Liss, who has not been sued. However, Relators have made no showing as to why the absence of Liss should allow Relators to escape liability for their own acts and omissions. Nor have Relators made any showing that the absence of other potentially culpable parties works some prejudice upon them. To the extent Relators believe that Liss or anyone else should share responsibility for the bondholders' losses and damages, Relators are free to pursue claims for indemnity or contribution against them. Indeed, some of the Relators already have asserted such claims against Liss and various brokers in this action. Appendix, Tab 1

Red Oak Financial

In the proceedings concerning Plaintiffs' motion for class certification, Relators were willing to go to the lengths of duplicity in attempting to stave off class certification. Relators accused SFBB of acting improperly because it concluded that it did not appear worthwhile to pursue claims under a credit agreement against Red Oak Financial ("Red

Oak"), an entity owned by Liss. Ex. 32, p. 128. What Relators failed to divulge, however, was that the Bank and ALCT, themselves, had standing to pursue the same claims against Red Oak, and reached the same conclusion – that it was not worthwhile to pursue such claims. Writ Ans., pp. 30-31; Bondholders' Writ Opp., pp. 16-21.

Moreover, the Bank's and ALCT's decision followed proceedings forming part of the Equity Action, and conducted entirely under seal. In those sealed proceedings, the court appointed a Special Counsel to evaluate the Red Oak claims – Martin Green, who later became, and remains, counsel for Defendants/Relators Chlebowski and Frownfelter in this action. Following an investigation costing $15,000 and funded by the Trust (with monies that otherwise would have been available for distribution to the bondholders), Green concluded that it was not worthwhile to pursue claims against Red Oak:

> My opinion, based upon my review of numerous documents, including the Credit Agreement, Servicing Agreement, the April 13, 1995 Prospectus, interviews with the representatives of the Trust and its related entities and applicable research, is that the likelihood of a favorable result in an action against Red Oak based upon the Credit Agreement is remote and that the cost of prosecuting such an action – $50,000 to $75,000 – is not warranted. It is also my opinion that, even if a judgment were obtained against Red Oak, its collectability is also remote.

Bondholders' Writ Opp., pp. 17-18.

Relators apparently felt secure in mounting their attack against SFBB regarding Red Oak because the Equity Action proceedings concerning Red Oak were under

seal and thus not accessible to Plaintiffs. When Plaintiffs moved to lift the seal, the Bank, Doster and their counsel vigorously opposed it. But the court lifted the seal, which revealed Relators' duplicitous tactics; and only then did Relators back off their attack on SFBB over the non-pursuit of claims against Red Oak. ***See*** **Bondholders' Writ Opp., pp. 16-21.**

Class Certification Order

The trial court, after considering all of the evidence, briefs and arguments, entered its Order on May 12, 2003, granting class certification. Ex. E. Judge Kendrick expressly found that "[t]he plaintiffs as representatives of the class have no interests adverse or antagonistic to members of the class and will fairly and adequately protect the members of the class." Ex. E, p. 2. Judge Kendrick further found that "[t]he prerequisites required by Mo. Sup. Ct. R. 52.08(b)(3) exist and are sufficient to justify a class action." *Id.* He went on to state:

> Defendants have challenged plaintiffs' counsel's qualifications to act as class counsel based on their having accepted information, documents and financial assistance from certain third parties to facilitate their pursuit of the claims which are the subject of this action, and counsel's concomitant agreement that they would not be in a position to pursue any claims against the parties providing such assistance – although plaintiffs and class members are free to pursue any and all such claim through other means. The Court finds that the foregoing circumstances do not justify declining to certify a class or refusing to allow plaintiffs' counsel to proceed forward with this action. The relevant circumstances

> will be fully disclosed in the notice to class members, and any class member who may disagree with the *strategic decisions made by the class representatives and plaintiffs' counsel* may elect to opt out of the class. The Court is aware of no other class action asserting the claims that are the subject of this action. Accordingly, absent this case proceeding as a class action, class members may have no other practicable means of seeking to vindicate the rights and interests that are the subject of this action. (Emphasis added.)

Ex. E.

In the proceedings below, Relators expressly disclaimed that they were seeking to disqualify SFBB from representing the named Plaintiffs. Rather, the sole thrust of Relators' argument was that SFBB should not be allowed to represent the unnamed class members. The Bank told the trial court:

> To reiterate, Defendants *have made no motion to disqualify Plaintiff's counsel*. Make no mistake – Plaintiffs' counsel is laboring under a serious conflict of interest. But the issue before the Court is whether Plaintiffs and their counsel will adequately represent the interests of the absent members of the class, not whether counsel should be disqualified from representing the named Plaintiffs who have agreed to this financial arrangement.

Writ Ans., p. 28; Defendant Union Planters Bank's Supplemental Memorandum in Opposition to Plaintiff's Motion for Class Certification, Ex. F to Bondholders' Writ Opp., p. 3 (emphasis in original). *See* Ex. 32, pp. 72, 83. Relators took a similar position in

their Suggestions in Support of Petition for a Writ of Prohibition, filed in this Court, at pp. 2 and 15.

Consultations and consent to limit the scope of class counsel's representation have not yet occurred with respect to the unnamed class members. That process is governed by the giving of class notice, and the opt-out procedure, all of which are subject to the approval and control of the trial court.

The process of drafting the class notice, considering objections asserted by Relators to the form of Plaintiffs' proposed notice, and finalizing the notice was ongoing when Relators filed their initial petition for writ of prohibition in the Court of Appeals. That court summarily denied the writ petition without a response having been filed.

Since the very public default on the Bonds, which occurred in 1998, no other class action has been filed on behalf of the bondholders. Nor has any other law firm emerged manifesting a desire to pursue this case or one like it. Writ Ans., p. 22; Ex. 32, p. 95.

Plaintiffs have elected to have SFBB represent them in this action. Through the enormous amount of work that it has done on this case over the past five and one-half years, SFBB has developed a degree of mastery over the complicated facts relating to this case, and the myriad pertinent legal concepts, which would be extremely difficult to replicate. From the hundreds of thousands of dollars of uncompensated time and expenses it has invested in this action, as well as the degree of success obtained on issues adjudicated thus far, it is clear that SFBB is prepared to pursue recovery of the bondholders' losses and damages in this action zealously, diligently and competently.

POINTS RELIED ON

I. NO PROPER BASIS EXISTS ON WHICH THIS COURT MAY CONCLUDE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING, AFTER FULL CONSIDERATION OF THE ARGUMENTS RAISED BY RELATORS, THAT CLASS COUNSEL WILL FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF ABSENT CLASS MEMBERS.

Levy & Craig, P.C. v. C. W. Luebbert Construction Co.,
58 S.W. 3d 81 (Mo. App. W.D. 2001)

Tedesco v. Mishkin, 689 F. Supp. 1327 (S.D.N.Y. 1988)

Kline v. First Western Government Securities, Inc.,
1996 WL 153641 (E.D. Pa. 1995)

Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653 (E.D. Mich. 1995)

II. NO PROPER BASIS EXISTS ON WHICH THIS COURT MAY CONCLUDE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING, AFTER FULL CONSIDERATION OF THE ARGUMENTS RAISED BY RELATORS, THAT THE NAMED PLAINTIFFS WILL FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF ABSENT CLASS MEMBERS.

III. THE TRIAL COURT PROPERLY FOUND THAT CLASS COUNSEL WILL ADEQUATELY REPRESENT THE INTERESTS OF ABSENT CLASS MEMBERS, AND DID NOT IMPROPERLY REQUIRE SUCH ABSENT CLASS MEMBERS TO MAKE THAT DETERMINATION THEMSELVES.

Mo. Sup. Ct. R. 4-1.8(f) and Official Comment Thereto

Biben v. Card, 1986 WL 1199 (W.D. Mo. 1986)

IV. THE CIRCUMSTANCES OF THIS CASE GIVE RISE TO NO DE FACTO SETTLEMENT CLASS EXEMPT FROM JUDICIAL OVERSIGHT OR OTHER VIOLATION OF THE DUE PROCESS JUSTIFICATIONS FOR CLASS ACTIONS.

W.S.A. § 893.93(1)(b)

ARGUMENT

STANDARD OF REVIEW

Interlocutory review of a trial court decision through a writ of prohibition is appropriate only in extraordinary circumstances. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). A writ is proper only to prevent an abuse of judicial discretion, irreparable harm to a party, or exercise of extra jurisdictional power. *See State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-7 (Mo. banc 2001).

"Determination of whether an action should proceed as a class action under rule 52.08 ultimately rests within the sound discretion of the trial court." *State ex rel. American Family Mutual Insurance Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc. 2003) (citation omitted). Relators have the burden of proving that the trial court abused its discretion. *See State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). To prove an abuse of discretion justifying the issuance of a writ, Relators must show that the trial court's order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration. *Id.*; s*ee also Giddens v. Kansas City Southern. Ry. Co.*, 29 S.W.3d 813, 819 (Mo. banc 2000).

"In an action in prohibition, there is a presumption that the trial court acted correctly." *State ex rel. Chaney v. Franklin*, 941 S.W.2d 790, 792 (Mo. App. S.D. 1997). Accordingly, the trial court's factual determinations should be upheld unless they are unsupported by, or against the weight of, the evidence. *See Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc. 1976).

A fundamental flaw in Relators' position is that it is predicated on an alleged agreement and course of conduct which is at odds with the facts found by the trial court. Contrary to Relators' characterization of the facts, what the trial court found occurred was:

> plaintiffs' counsel's . . . having accepted information, documents and financial assistance from certain third parties to facilitate their pursuit of the claims which are the subject of this action, and counsel's concomitant agreement that they would not be in a position to pursue any claims against the parties providing such assistance – although plaintiffs and class members are free to pursue any and all such claims through other means.

Ex. E, p. 2. The trial court further found the foregoing to constitute "strategic decisions made by the class representatives and plaintiffs' counsel." *Id.* at p. 3.

As reflected in the Statement of Facts set forth *supra*, the trial court's findings are supported by substantial evidence. Indeed, Relators have not contended otherwise. Instead, without even addressing how their arguments relate to the facts as found by the trial court, Relators simply proceed to launch their attacks predicated on different factual premises. In so doing, Relators ignore the applicable standard of review.

Fairly viewed, the thrust of Relators' arguments is *not* that the trial court abused its discretion in granting class certification, but rather that this Court should second guess

the trial court and substitute its judgment.[8] That, of course, is not the proper role of an appellate court.

In any event, Relators cannot even begin to meet their burden of proof required to sustain a writ. The trial court's class certification decision turns upon factual determinations which are fully supported by the record. Judge Kendrick's decision logically applied the facts and law, was carefully considered, and by no means can be said to be arbitrary or unreasonable. The trial court clearly did not abuse its discretion in granting class certification.

I. NO PROPER BASIS EXISTS ON WHICH THIS COURT MAY CONCLUDE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING, AFTER FULL CONSIDERATION OF THE ARGUMENTS RAISED BY RELATORS, THAT CLASS COUNSEL WILL FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF ABSENT CLASS MEMBERS.

In what has become an increasingly used – albeit misguided and distasteful – litigation tactic, Relators accuse bondholders' counsel of acting in contravention of ethical rules with respect to strategic decisions they made concerning where necessary

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[8] In the same vein, Relators also seek to have this Court second guess the strategic decisions made by SFBB and Plaintiffs as to what strategy afforded the bondholders the best chance of recovering their losses and damages on the Bonds, as well as second guess the Court of Appeals, which summarily denied Relators' initial writ petition.

assistance could be obtained to enable an action to go forward, what claims would be asserted, and who would be sued. On that basis, Relators maintain that the trial court abused its discretion in granting class certification, and, indeed, that certification of the class was so clearly an abuse of discretion that this Court should undo the trial court's class certification order – entered after protracted proceedings involving three days of evidentiary hearings and exhaustive briefing and argument – on a writ of prohibition.

The tactical use of ethical attacks on class counsel of the kind employed by Relators here is much disfavored. In *Tedesco v. Mishkin*, 689 F. Supp. 1327 (S.D.N.Y. 1988), a class action in which defendants' counsel accused plaintiffs' counsel of ethical violations in not fully disclosing an alleged conflict, the court stated:

> This court is aware, however, of the increasing use of motions to disqualify counsel as a tactic in litigation. Furthermore, disqualification of counsel results in an immediate adverse affect on the client. This would be especially true in the instant case, in which plaintiffs' counsel is thoroughly conversant with this case's long, tortuous history.

689 F. Supp. at 1340 (emphasis added, citations omitted). In light of this, "[u]nless an attorney's conduct is so egregious that it tends to taint the underlying trial, a court should be hesitant to disqualify counsel." *Id.* (citations and internal quotations omitted).

In their arguments against class certification, Relators have made no effort to deny that the bondholders have suffered millions of dollars in losses and damages. Nor have Relators in any way demonstrated – either factually or legally – any lack of merit in Plaintiffs' claims that the bondholders' losses and damages were caused by multiple

defalcations on the part of Relators. Rather, the thrust of Relators' position is that there are other culpable parties who have not been named as defendants.[9]

Ironically, although they utterly failed to protect the bondholders' interests when the events leading to their multi-million dollar losses on the Bonds were unfolding, Relators now attempt to assume the mantle of the bondholders' protectors. Relators contend that bondholders' counsel acted improperly in failing to sue certain additional parties, and that in order to protect the bondholders from that allegedly improper conduct, class certification should be undone and the bondholders thus should be effectively precluded from pursuing class claims against *any* of the potentially culpable parties who *were* sued – namely the Relators.

In a further ironic twist, Relators advance arguments concerning consultation and informed consent that pertain almost exclusively to counsel's dealings with the named Plaintiffs. However, Relators made clear in the trial court, and in their initial filings in this Court, that they are not seeking to challenge SFBB's ongoing representation of the

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[9] Of course, decisions as to what claims to assert and against whom typically are the prerogative of plaintiffs and their counsel, not the defendants. *See, e.g., Kline v. First Western Government Securities, Inc.*, 1996 WL 153641 (E.D. Pa. 1995). Moreover, defendants generally are not prejudiced by whatever strategic decisions plaintiffs and their counsel make in these respects since, if there are other culpable parties among whom liability should be shared, the named defendants may proceed against them through claims for indemnity and/or contribution.

named Plaintiffs in this action. *See* discussion at pp. 36, *supra*. Rather, Relators claim only to be concerned about the interests of the unnamed class members. As to those persons, though, there have not yet been any consultations or consent concerning the limitations on the scope of SFBB's representation. That will occur via the class notice. Relators will have ample opportunity to present their position as to the full scope of information that should be put before the absent class members in the class notice, and the contents of the notice ultimately will be decided upon by the trial court.

The true motivations of Relators in mounting their attacks upon bondholders' counsel are readily apparent. Relators care not one whit about the bondholders. Clearly, Relators are acting as protectors of their own interests, not those of the bondholders.

Notably absent from Relator's Brief is any disclosure of the real implications to bondholders of what Relators are seeking to do. Denial of class certification would work a *de facto* release of the bondholders' claims and allow Relators to escape millions of dollars in liability for their many defalcations which are the subject of the underlying action.

We know of no other class action that has been filed in the more than five years since the very public default on the Bonds, and no other counsel has manifested an interest in representing the bondholders in this factually and legally complex, multi-party litigation. Thus, a denial of class certification likely would serve to end this litigation, leave most or all of the bondholders without any effective remedy for recouping their millions of dollars in losses and damages, and allow Relators to escape liability for their multifarious defalcations. Without a doubt, Relators are well aware of those dynamics,

and that – not a legitimate concern that bondholders are being victimized by improper conduct on the part of counsel – is why Relators have strived so mightily to defeat class certification by whatever means possible.

In their zeal to find some basis for defeating class certification, Relators ignore the wealth of evidence in the record as to the true basis for SFBB's strategic decisions regarding who to sue and with whom to ally. *See* discussion at pp. 15-37, *supra*. Simply stated, SFBB's decisions were based upon well-considered and strategic judgments regarding the best defendants to target in bringing a class action which could be expediently pursued on behalf all 650 bondholders. Counsel's judgment calls were fully disclosed to and approved by the named Plaintiffs. Relators' self-serving cries that there was some impropriety ignore the mountain of evidence adduced at the protracted class certification hearing as to what was done and why; ignore the fact that the trial court, after giving Relators full opportunity to present evidence and advance arguments, rejected their contentions opposing class certification; and ignore the fact that there is more than ample support in the record for the trial court's findings regarding class certification.

Further, Relators distort the strategic judgments that were made. Those judgments were that, in order to pursue viable claims, it was necessary to obtain assistance from certain quarters, with it being recognized that counsel could not then turn around and target the parties providing that assistance; otherwise, the assistance would not be forthcoming. However, no bondholder released or otherwise gave up any claim. The

understanding was that bondholders were free to pursue any such claims, albeit they would have to do so with other counsel.

Relators claim that the bondholders' interests are in jeopardy because SFBB is not adequate counsel. To the contrary, the bondholders are now proceeding on sixteen viable causes of action against six defendants including a national banking institution (the Bank), and a national appraisal company (Marshall & Stevens). Moreover, because of the strategic judgments made as this case was unfolding, the bondholders have evidence necessary to prove these causes of action. It very clearly would not serve the bondholders' interests to overturn the trial court's order granting class certification.

The trial court accorded careful consideration to the bondholders' motion for class certification. There is more than ample support in the record for the trial court's decision certifying the class, which to a large extent involved fact-bound determinations and exercises of the trial court's discretion. No basis exists for overturning the trial court's exercise of its discretion in that regard. Most assuredly, no basis exists for concluding that the trial court's carefully considered decision concerning class certification is so clearly unsupported that it is appropriate to overturn it on a petition for a writ of prohibition as a clear abuse of discretion.

A. Relators' Arguments Are Predicated On a Number of Factual Premises Which Are Not Supported by the Factual Record.

Before turning to a discussion of Relators' specific arguments concerning adequacy of representation, it is important to note that, in several respects, Relators'

arguments are based on factual premises that simply are not borne out by the record. Among other things:

1. Relators assert that Liss was "part of the consortium of brokers who paid" the initial $20,000 retainer, and "therefore Liss was one of the parties Class Counsel could not even consider suing." Rel. Br., p. 54. However, Relators' assertions in this regard are unaccompanied by any citations to the record, and are flat wrong. The $20,000 retainer was paid by the three Brokers, not Liss. Ex. 32, pp. 106, 114; Ex. 33, pp. 210-11. Liss entered the picture only later. Ex. 32, p. 119; Ex. 33, p. 219.

2. Relators assert that "Underwriter and the brokers interfered with Class Counsel's independent professional judgment . . . by foreclosing any consideration of class claims against Underwriter and Underwriter's counsel." Rel Br., p. 51. This is a gross distortion of the true facts. Relators' assertions ignore the facts that SFBB's initial dealings were only with the Brokers, not Liss; SFBB considered at the outset that the Brokers were not a suitable target for class action claims – most notably because claims against them would turn on facts unique to each customer; Liss entered the picture only later, when additional sources of information were needed to determine whether viable class claims existed, and, if so, to prove them; SFBB concluded, for various reasons discussed previously, that Liss, too, was not an ideal target for class claims and might be more valuable as an ally; and all of the foregoing determinations were made as part of SFBB's exercise of its independent professional judgment as to what strategy was likely

to afford the bondholders the best chance of recouping their losses and damages. *See* discussion at pp. 16-39, *supra*.[10]

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[10] Relators argue that the fact that bondholders may have had arbitration agreements with Liss and/or the Brokers did not detract from their being potential class action defendants because certain securities industry rules exclude class claims from mandatory arbitration claims. However, this argument misses the point. SFBB's assessment was not that arbitration clauses necessarily would defeat class treatment of certain claims, but rather that they might complicate class certification. That assessment was sound notwithstanding Relators' arguments. For one thing, the provisions of the NASD Rules cited by Relators were adopted in 1992, and can be read to apply only to arbitration agreements which post-dated the amendments. *See* 92-65 Amendments to Section 12 of the NASD Code of Arbitration Procedures and Article III, Section 21 of the NASD Rules of Fair Practice, a copy of which is included in the Appendix to this brief at Tab 2. Further, the NASD class action exclusion renders a claim not subject to arbitration only if: (1) the claim "is encompassed within a putative or certified class action in state or federal court;" and (2) the claimant has elected to participate in the class action. *See* NASD Code of Arbitration Procedure § 10301(d)(1) & (2), copy of which is included in the Appendix to this brief at Tab 3. If there is a dispute over whether a claim is encompassed in a class action, the NASD Code of Arbitration Procedure requires that the dispute be referred to a panel of NASD arbitrators for resolution or decided by the

3. Relators claim that "none of the information Class Counsel claims he needed would have required Class Counsel to expressly agree not to sue Underwriter when he did on December 19, 1998." Rel Br., p. 55. However, this assertion is flawed in several respects. First, Relators' argument is made years after the fact with the benefit of hindsight. Of course, when SFBB was making its strategic judgments as to whether and how class claims might be pursued on behalf of the bondholders, SFBB did not have the benefit of hindsight.

Second, hindsight has confirmed that the strategic decisions which SFBB made in 1998 and 1999, as to what assistance was necessary to facilitate the development and pursuit of viable class claims against solvent defendants, were absolutely sound. While Relators argue that SFBB simply should have filed a class action on a hope and a prayer, and counted on obtaining supporting facts and documents through the discovery process, hindsight has revealed the problems with that approach. As discussed previously, Relators and others have produced little in the way of documents and information in the discovery process and have largely stonewalled. *See* discussion at pp. 31-32, *supra*.

Third, Relators' suggestion that there was critical significance to what transpired on December 18, 1998 is incorrect and misleading. The acknowledgment that important information and key documents were being provided to SFBB (including facts and communications that might otherwise be privileged), in the context of an understanding

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court in which the class action is pending. *See* NASD Code of Arbitration Procedure § 10301(d)(3), Appendix, Tab 3.

that SFBB would not then turn around and use it against the parties providing the assistance, was merely an express acknowledgment of an implicit understanding that had developed earlier. Writ Ans., p. 11; Ex. 32, pp. 114, 163. Moreover, Relators' argument at pp. 55-56 of their Brief as to the extent of what SFBB knew as of December, 1998 is not fully supported by the cited record references, and ignores other evidence in the record that directly refutes Relators' contention that everything was fully known at that point. *See, e.g.*, Ex. 32, pp. 118-19, wherein Greiman testified:

> And I want to emphasize, there was never a point we could say that now we have the full picture, we have everything we need. This was an enormously complicated situation we were trying to sort out. Part of it was sorting out what claims there are against whom and part of it is sorting out what economic risk my law firm and I are willing to take in pursuing this case, and whether it's a good business decision to go forward. Much of the information that was provided by the brokers simply led to more questions, which we would then pursue with the brokers. And in some respects, they didn't have the answers.

See also, Ex. 32, pp. 117-20, 129-31, 134-36, 165-77.

B. The Representation Agreement Represents a Permissible and Appropriate Limitation on the Scope of Plaintiffs' Counsel's Representation.

In arguing that SFBB has an incurable conflict of interest which precludes it from adequately representing the class, Relators rely on Rules 1.7(b) and 1.8(f) of the Missouri

Rules of Professional Conduct, Mo. Sup. Ct. R. 4-1.7(b) and 1.8(f). However, that reliance is misplaced.

Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected;
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Thus, by its terms, Rule 1.7(b) does not flatly prohibit a lawyer from proceeding with any representation where an actual or potential conflict of interest exists. Rather, the Rule provides that in such instances, the representation may proceed if "the lawyer reasonably believes the representation will not be adversely affected," and "the client consents after consultation."

Similarly, Rule 1.8(f) provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Here again, there is no blanket prohibition against a lawyer's accepting compensation for representing a client from one other than the client. The Rule makes clear that a divergence between the client and the person(s) paying the bills may be permissible so long as the client consents after consultation, the lawyer's exercise of his or her independent professional judgment is preserved, and the client's confidences are maintained

Based on the matters discussed at length above, there is a wealth of evidence that SFBB made the strategic judgment to accept information, documents and financial assistance from the Brokers and Liss to facilitate their pursuit of class claims, at the price of class counsel not being in a position to pursue claims on the bondholders' behalf against the parties providing such assistance – although the bondholders remained free to pursue any and all claims against the Brokers and Liss through other means.

There is ample evidence from which the trial court properly could have concluded, and did conclude, that SFBB reasonably believed its representation of the bondholders would not be adversely affected by taking that approach. In fact, there is ample evidence that not only did SFBB's strategic judgment not adversely affect the interests of the bondholders, it substantially advanced those interests. As discussed above, the information and other assistance that SFBB and the bondholders secured proved to be

invaluable in enabling Plaintiffs to develop the multiple viable class claims that are pending today and the evidence to support them. The bondholders would have encountered grave obstacles in getting to the point where they are in this case today with respect to the merits, absent the assistance obtained.

Again, as noted above, SFBB's strategic judgments were made in 1998, without the benefit of hindsight, so that is the context in which the fact and reasonableness of SFBB's belief that it was serving the interests of the bondholders should be assessed. However, it should be borne in mind that we are now five years beyond that point; and the benefit of five years' hindsight only serves to confirm that SFBB's and Plaintiff's strategic judgment was sound.

Finally, it should be evident from the foregoing that the strategic decisions which SFBB made did not work an interference with the exercise of its independent professional judgment. To the contrary, it was the exercise of SFBB's independent professional judgment that led it to make the judgment calls that it did as to how best to maximize the bondholders' chances of recouping their substantial losses and damages.

C. Plaintiffs Consented to the Limitations on the Scope of Plaintiffs' Counsel's Representation After Consultation.

Relators argue that SFBB failed to make adequate disclosure to Plaintiffs concerning the assistance it was securing from Liss and the Brokers, and the ensuing limitation on the scope of the representation that the firm was undertaking. On that basis, Relators contend that there was not adequate consultation and informed consent by

Plaintiffs. As discussed below, Relators' position is belied by the pertinent facts, and by applicable law.

As discussed previously, Liss and the Brokers contacted the bondholders, including Plaintiffs, about contributing to a retainer fund and acting as named plaintiffs in a class action to be brought. *See* discussion at pp. 23, *supra*. As a matter of common sense, none of the bondholders possibly could have expected that Liss and the Brokers were undertaking these efforts in order that they could be named as defendants in a class action lawsuit. Ex. 32, p. 138.

Moreover, the evidence adduced in the trial court demonstrated that Plaintiffs understood and consented to the premises on which this case has been brought and proceeded. Bondholders' Writ Opp., Exs. O-V.

In short, from the period preceding SFBB's engagement letter to Plaintiffs, all parties understood that it was *never*, at any time, part of SFBB's services to consider, investigate or pursue individual claims for each bondholder against their respective broker, or to pursue similar individual or group claims against Liss, as a broker or an underwriter.

Against this background, in July 1999, SFBB formalized its engagement with the Plaintiffs. In the engagement letter, SFBB again made clear that it would not be considering, investigating or pursuing claims against those parties, and fully disclosed the retainer payments and the other financial terms on which it proposed that the representation proceed. *See* Ex. G, quoted at pp. 23-26, *supra*.

Later, in October, 1999, SFBB sent another letter to the bondholders, forwarding a draft petition and stating:

> As stated in the engagement letter, we are not in a position to consider or pursue any claims against various brokers involved in selling the bonds, including but not limited to J.E. Liss and Company, Inc., as they are assisting with this case and have provided some of the funding for it. I want to reiterate, however, that your participation in this lawsuit does not preclude you from considering or pursuing claims against such persons with other counsel.

Ex. W. Notably, the draft petition enclosed with SFBB's correspondence did not include any claims against the Brokers or Liss.

Thus, all of SFBB's dealings and communications with Plaintiffs, as well as Plaintiffs' dealings with the Brokers and Liss, have left no room for reasonable dispute that Plaintiffs knew and understood that SFBB would not be investigating or pursuing claims against the Brokers or Liss, but that Plaintiffs were free to investigate and pursue such claims with other counsel.

Nonetheless, Relators accuse SFBB of acting improperly because it did not investigate all of the claims it was *not* pursuing and did not provide to each Plaintiff a detailed analysis of the claims *not* being pursued. Apparently, Relators contend that SFBB should have investigated not only potential class claims against Liss, but also individual claims on behalf of each of the 650 bondholders against the more than 45 brokers who sold the Bonds to them, and provided a detailed analysis and assessment of

each of those claims – all this in a representation in which the consideration, investigation and pursuit of such claims *expressly never was contemplated by any party*.

The laundry list of items set forth at pp. 61-62 of Relators' Brief illustrates the fallacies in Relators' position. Had SFBB addressed every one of those items with Plaintiffs, Relators undoubtedly would have set forth an additional list of items which they contend should have been discussed. The appropriate dividing line was to not even begin to provide advice concerning claims against the Brokers and Liss because it was understood that such matters were beyond the scope of SFBB's representation. Providing partial, but not complete, advice and analysis might have done more harm than good. Ex. 32, pp. 145-47.

Further, Relators' argument that Plaintiffs lacked sufficient information to make an informed choice regarding the retention arrangement and structure of the class action assumes that the only relevant facts Plaintiffs had were those contained in SFBB's two letters, and ignores all the other information Plaintiffs knew. In addition to the facts discussed above, in meetings with Plaintiffs regarding this case and their depositions, SFBB discussed the claims asserted against each Defendant, the role of each Defendant, and SFBB's decision to accept help and financial support from, rather than sue, Liss and the Brokers in this action. *See* discussion at pp. 27-28, *supra*. Further, in Relators' depositions of Plaintiffs, Relators' counsel repeatedly presented to Plaintiffs the kind of information they claim SFBB should have provided concerning claims against Liss and the Brokers, and did so in a manner so as to strongly suggest that Liss and the Brokers

were responsible for the Bond default. Nonetheless, each Plaintiff reaffirmed the retention agreement. *See* Bondholders' Writ Opp., Exs. O-V hereto.

Finally, Relators' arguments misperceive what the law requires as to the degree of consultation necessary to support a determination of informed consent. In defining the "consent after consultation" requirement, Rule 9.1 of the Missouri Rules of Professional Conduct states:

> "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

Mo. Sup. Ct. R. 4-9.1 (emphasis added). S*ee also* Missouri Rule of Professional Conduct 1.4 (b), Mo. Sup. Ct. R. 4-1.4(b), requiring that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Levy & Craig, P.C. v. C. W. Luebbrt Construction Co., 58 S.W. 3d 81 (Mo. App. W.D. 2001), demonstrates that effective "consent after consultation" does not require a litany of information. In that case, consent was found to be effective based upon nothing more than an oral disclosure of a conflict between two clients. *Id.* at 83. In fact, the court of appeals made clear that the formality of a writing is not required. *Id.* at 83 n.1. The circumstances of this case adequately fulfill the consent after consultation requirement as defined in Rule 9.1 and *Levy & Craig*.

D. There Has Been No Failure to Protect Confidential Information

Relators contend that SFBB has failed to safeguard privileged and confidential information. However, this argument rests on an erroneous reading of the July, 1999 engagement letter and is a red herring.

Greiman testified that the language from the July, 1999 letter pointed to by Relators sought approval to share confidential information with Liss or the Brokers only where doing so would further the bondholders' interests, such as by enabling counsel to confirm or expand on facts learned from other sources. Writ Ans., pp. 9-10; Ex. 32, pp. 142-44. He further testified that no privileged and confidential information has been shared with the Brokers or Liss. *Id.* Relators have adduced no evidence to the contrary. There has been no failure to protect confidential information.

E. The Relevant Case Law Does Not Support Relators' Position

Relators' Brief is replete with statements of general legal principles relating to various facets of class action jurisprudence. Plaintiffs take issue with few, if any, of these principles. However, the cases cited in those respects provide little or no support for Relators' position that a writ of prohibition should be granted undoing the trial court's class certification order.

Relators rely on a number of cases which purportedly involve circumstances analogous to those present here. But these cases do little to advance Relators' position, in that they are readily distinguishable from the present controversy. For instance, *City of Excelsior Springs v. Elms Redevelopment Corp.,* 18 S.W.3d 53 (Mo. App. W.D. 2000), involved a *defendant* class of 850 persons. Of the nine defendants who filed an answer

and/or appeared at the class certification hearing, only one of them was represented by counsel – and that counsel made clear that he was representing only his individual client, not the class. 18 S.W.3d at 56. The trial court certified a class, but directed that plaintiffs provide individual notice to each class member – which plaintiffs then failed to do. *Id*. Thus, there was no class counsel and no class notice. *City of Excelsior Springs* is nothing like the present controversy.

State v. Homeside Lending, Inc., 826 A.2d 997 (Vt. 2003), concerned whether an action brought by the state of Vermont was foreclosed by a judgment in an earlier class action in Alabama, which involved a class of more than 300,000 mortgagors from a number of states, including Vermont. The case was settled on terms by which class members received either $1.78 or $8.76, but class counsel received $500,000 in attorney's fees, *with those fees coming from class members' funds held in escrow accounts which belonged to the class members irrespective of the outcome of the class action, and fees being assessed against various class members in amounts which exceeded their financial benefit derived from the action.* 826 A.2d at 999-1000, 1009-10. Moreover, the class notice failed to disclose that a class member's liability for attorney's fees could exceed the economic benefit from the action, and class counsel made misleading representations to the court concerning the economic benefits of the

settlement. 826 A.2d at 1014-15. The *Homeside Lending* case is nothing like the present controversy.[11]

Davis v. Comed, Inc., 619 F.2d 588 (6th Cir. 1980), involved not a class action but a shareholder's derivative suit, in which the plaintiff shareholders sought rescission of a real estate transaction so as to undo the sale of the land to "innocent purchasers for value without notice of any defects." 619 F.2d at 691. The trial court awarded certain damages but rejected the rescission claim, and the Sixth Circuit held "[i]t is clear that with all these innocent people involved a court would not grant rescission and plaintiffs and their counsel must have been aware of that fact." 619 F.2d at 591. The court found that plaintiffs, in seeking rescission, were acting as a front for others whose interests were inimical to those of the shareholders, and had caused other shareholders to have to pay

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[11] We note also that in *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), the Ninth Circuit held that absent class members may not challenge the adequacy of the class' representation in collateral proceedings. The court reasoned that "[d]ue process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review." *Id*. *See also Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 (3rd Cir.), *cert. denied*, 513 U.S. 986 (1994).

considerable defense costs. On that basis, the court held that it was appropriate to limit plaintiffs' share of the damages recovered. *Davis* thus has no relevance to this case.

One lesson to be drawn from *City of Excelsior Springs, Homeside Lending* and *Davis* is the value of awaiting the completion of trial court proceedings, and developing a full record, before an appellate court is called upon to decide the kinds of issues presented in those cases. Only then can the court fully determine the pertinent issues in the context of the full record of the representative parties' and counsel's actions and the outcome of the case.

Another case relied on by Relators, *Stavrides v. Mellon National Bank & Trust Co.*, 60 F.R.D. 634 (W.D. Pa. 1973), simply involved a motion by a defendant in a class action to compel answers to deposition questions.

A further case relied on by Relators, *McClendon v. Continental Group, Inc.*, 113 F.R.D. 39 (D.N.J. 1986), supports Plaintiffs' position, not Relators'. In *McClendon*, the court granted class certification even though a third party paid the plaintiffs' legal fees, the paying party was a potential defendant, and plaintiffs did not sue it. The court reasoned that these facts did not create antagonism between the plaintiff and the class so as to preclude class certification. 113 F.R.D. at 42-43. In the same vein, *see Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653 (E.D. Mich. 1995). There, the court held that plaintiff's counsel was adequate and certified the class notwithstanding that counsel for the class represented the UAW in other matters, the UAW had potential liability, and the UAW was paying plaintiff's fees. 172 F.R.D. at 663-65.

A further case relied on by Relators, *Zucker v. Occidental Petroleum Corp.,* 192 F.3d 1323 (9th Cir. 1999), involved an award of attorney's fees following settlement of a securities fraud class action. Plaintiffs' counsel initially was awarded $3 million in fees although the class members got no cash, and there was no settlement fund, so the fees were negotiated with and paid by defendants. Also, *Zucker* largely focused on issues of standing. *Zucker* is nothing like this case.

The most significant legal principles which control this case are threefold. First, a basic tenet of our adversarial justice system is that "[t]he plaintiff is 'the master of his claim' and is 'surely entitled to exercise some discretion in deciding which defendants to sue.' " *Kline v. First Western Government Securities, Inc.*, 1996 WL 153641, *10 (E.D. Pa. 1995). "Class representatives need not assert every claim available to the class. Indeed, opting not to assert certain claims may be an essential part of adequately representing the class." *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1339 (S.D.N.Y. 1988), citing *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 485 n. 27 (5th Cir. 1982) (per curiam), *cert. denied*, 463 U.S. 1207 (1983).

In complex, multiparty class actions, class counsel's discretion in this regard is even more far reaching. Courts routinely recognize that class counsel, far more than counsel in other sorts of litigation, play the central role in investigating, structuring and pursuing the class' claims. In fact, in *Bradford v. AGCO Corp.*, 187 F.R.D. 600, 605 (W.D. Mo. 1999), the court noted that it would be "shocked" if the representative plaintiff took an active role in these matters. "It is familiar law that a class representative need not have personal knowledge of the evidence and law involved in pursuing a

litigation. *It is the lawyer's task to prepare the case on both the facts and the law."* *Nathan Gordon Trust v. Northgate Exploration, Ltd.*, 148 F.R.D. 105, 107 (S.D.N.Y. 1993) (emphasis added); *see also Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 327-28 (S.D. Fla. 1996)(noting that a lack of personal knowledge by the named plaintiffs is understandable and common in complex class actions).

In *Kline v. First Western Government Securities, Inc., supra*, as here, the defendants urged that class certification should be denied because class counsel decided not to sue a potential defendant accounting firm even though the firm produced some materials relating to plaintiffs' claims. The court flatly rejected this argument. In so doing, the court held that it was "well within the plaintiff's considerable discretion to decide not to sue" the firm and reasoned that it was a telling indication of the "rampant litigiousness in our society" that a party would point to a decision *not* to sue someone as evidence of inadequacy. 1996 WL 153641 at *10 & n. 9.

Second, as previously noted, determination of whether a suit should proceed as a class action "ultimately rests within the sound discretion of the trial court." *State ex rel. American Family Mutual Ins. Co., supra,* 106 S.W.3d at 486.

Third, "[t]he question as to adequate representation and protection of interest of the class must be determined from the particular facts appearing in each case." *City of St. Peters v. Gronefeld,* 609 S.W.2d 437, 439 (Mo. App. E.D. 1980).

Applying these principles here, there is no basis for disturbing the trial court's carefully considered Order granting class certification.

II. NO PROPER BASIS EXISTS ON WHICH THIS COURT MAY CONCLUDE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING, AFTER FULL CONSIDERATION OF THE ARGUMENTS RAISED BY RELATORS, THAT THE NAMED PLAINTIFFS WILL FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF ABSENT CLASS MEMBERS.

In Point II of their Argument, Relators advance essentially the same arguments as advanced under Point I. The only difference is that Point II focuses on the adequacy of the named Plaintiffs as class representatives, whereas Point I focuses on the adequacy of class counsel.

Relators' arguments under Point II fail for the same reasons as discussed previously in response to Point I. If anything, Relators' arguments under Point II are even more lacking in merit in that the obligations arising under the Missouri Rules of Professional Conduct, which represent much of the focus of Relators' arguments under Point I, obviously apply only to lawyers, not non-lawyers such as the Plaintiffs.

The trial court expressly found that Plaintiffs will adequately protect the interests of the class:

> The plaintiffs as representatives of the class have no interests adverse or antagonistic to members of the class and will fairly and adequately protect the members of the class.

Ex. E, p. 2. No proper basis exists for concluding that the trial court abused its discretion in concluding that Plaintiffs will adequately protect the interests of the class and in otherwise concluding that class certification is appropriate.

III. THE TRIAL COURT PROPERLY FOUND THAT CLASS COUNSEL WILL ADEQUATELY REPRESENT THE INTERESTS OF ABSENT CLASS MEMBERS, AND DID NOT IMPROPERLY REQUIRE SUCH ABSENT CLASS MEMBERS TO MAKE THAT DETERMINATION THEMSELVES.

In Point III of their Argument, Relators state that "[u]nder Rule 52.08, the court *has a duty* to consider whether Class Counsel and the named plaintiffs have provided fair and adequate representation of the absent members of the class and whether they will do so in the future." Rel. Br., p. 70 (emphasis in original). We have no quarrel with that statement, and assert that the trial court did just that and properly reached an affirmative conclusion.

As discussed previously in connection with Point II, the trial court expressly found that Plaintiffs will fairly and adequately protect the members of the class. The trial court further expressly found that "[t]he prerequisites required by Mo. Sup. Ct. R. 52.08(b)(3) exist and are sufficient to justify a class action." Ex. E, p. 2.

Rule 52.08(b)(3) expressly subsumes the requirement, set forth in subdivision (a) of Rule 52.08, that "the representative parties will fairly and adequately protect the interests of the class." As discussed previously, there is ample evidence in the record

supporting these conclusions, and it cannot be said that the trial court abused its discretion in so concluding.

Going beyond the foregoing determinations, the trial court stated: "The relevant circumstances will be fully disclosed in the notice to class members, and any class member who may disagree with the strategic decisions made by the class representatives and plaintiffs' counsel may elect to opt out of the class. . . ." Ex. E, pp. 2-3.

Thus, the trial court expressly contemplated that the strategic decisions made by Plaintiffs and their counsel, and the resulting limitation on the scope of counsel's representation, would be the subject of a court-supervised notice and opt-out procedure, whereby each class member would be informed of all of the facts and circumstances deemed pertinent by the trial court, and would have the ability to decide whether or not he or she wished to participate as a member of the class. This is exactly the kind of consent after consultation procedure which the Missouri Rules of Professional Conduct contemplate in the context of a class action. *See* Comment to Rule 1.8(f), Mo. Sup. Ct. R. 4-1.8(f):

> **Person Paying for Lawyer's Services.** Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. *Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.* (emphasis added)

Noteworthy in this regard is *Biben v. Card*, 1986 WL 1199 (W.D. Mo. 1986). In *Biben*, plaintiffs originally sued a brokerage firm ("Hutton") and one of its brokers, among others, and later dropped those two parties. The defendants opposed class certification because of this, contending that dropping those defendants implicated a clear conflict of interest. They argued that plaintiffs' counsel was inadequate to act as class counsel because "the class deserves representatives willing to pursue *all* potential claims, including those against brokers." *Id*. at *9.

The court rejected these contentions. While noting that plaintiffs' counsel had not presented an adequate explanation for his decision to drop certain defendants (the "Hutton" defendants), the court nonetheless granted class certification. *Id.* at *9. The court held that class notice making clear that certain claims are not part of the case would protect the class members' interests in the unasserted claims:

> [T]he interests of class members vis-a-vis Hutton (or non-Hutton brokers for that matter) can be safeguarded by use of a class notice that clearly indicates that claims against brokers that have been asserted by [certain shareholders] are not involved in this litigation and that any such claims must be pursued outside the context of the present case.

Id.

Relators assert that the court-supervised notice and opt-out procedure cannot fulfill the consent requirement regarding the terms of representation. However, Relators' argument is contrary to the official comment to Missouri Rule of Professional Conduct 1.8(f).

Relators also contend that the procedure contemplated by the trial court "does not protect all absent class members, because class action notice rarely reaches all class members." Rel. Br., p. 73. However, this argument ignores the fact that this is not a case in which there are many thousands of class members, with notice to be made by publication. There are approximately 650 bondholders; the Bank, as Indenture Trustee, has a complete list of bondholders, comprised of names, addresses and number of Bonds held; and notice will be provided to each bondholder by mail. Accordingly, the procedure adopted by the trial court is calculated to provide effective notice.

Moreover, Relators' argument ignores the fact that the efficacy of notice in a class action is dependent not on the notice being delivered to every last class member, but rather to a sizeable percentage of the class. *See State ex rel. American Family Mutual Ins. Co., supra,* 106 S.W.3d 483, 491 (Wolff, J. concurring):

> Further, while even individual notice by mail does not deliver actual notice to the entire class, there is actual notice to a substantial enough number of the members of the class to ensure that their interests – which are interests in common by definition – will be protected. (footnote omitted)

Relators further argue that the proposed class notice fails to include a provision concerning the right of a class member to enter an appearance through counsel. Rel. Br., p. 73 n.16. However, this argument relates to the form of the notice, not to whether

proper grounds exist for the issuance of a writ of prohibition undoing class certification, and is best directed to the trial court.[12]

Relators also argue that it is not feasible to fashion a procedure whereby sufficient information can be provided to absent class members to enable them to make an informed decision concerning whether to opt out of the class. Rel. Br., p. 75. Again, Relators do not demonstrate why that is so. Instead they cite to the *Homeside Lending* case, which is nothing like the present controversy.

In short, Relators must concede that in the absence of the strategy fashioned by SFBB and Plaintiffs, no other class vehicle for attempting to remedy the bondholders' losses and damages has emerged. At the same time, Relators contend that the consent procedure utilized with the named Plaintiffs was inadequate; the arrangement rested on irreconcilable and non-waiveable conflicts in any event; and there is no way to fashion a proper notice and consent procedure for the absent class members.

In effect, Relators' position is that the only way to protect the bondholders' interests from the conflicts posited by Relators is to leave them without an effective means of recouping their losses and damages stemming from the Bond default. Thus, Relators' position is tantamount to an argument that 'we had to destroy the bondholders

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[12] Relators make no showing that they advanced this argument to the trial court during the proceedings on shaping the class notice. In any event, they will have ample opportunity to do so if and when the preliminary writ is quashed.

to save them.' It is clear whose interests Relators are intent on protecting – and it is not the interests of the bondholders.

Overall in their arguments advanced in Point III, the inconsistency in Relators' position in these proceedings, and their disingenuousness as to whose interests they are seeking to protect, surface once again. Relators rail at length about the adequacy of the consent after consultation regarding the terms of representation had with respect to the named Plaintiffs. However, Relators have eschewed any claim that SFBB should be precluded from representing the named Plaintiffs. Rather, Relators assert that the allegedly inadequate consultation and consent with the named Plaintiffs should operate to bar SFBB from representing the absent class members. However, with respect to those class members, no consultation or consent yet has occurred; and, as contemplated by Missouri Rule of Professional Conduct 1.8(f), such consultation and consent will occur under the supervision of the trial court, which will have the opportunity and ability to ensure the adequacy of the process.

IV. THE CIRCUMSTANCES OF THIS CASE GIVE RISE TO NO *DE FACTO* SETTLEMENT CLASS EXEMPT FROM JUDICIAL OVERSIGHT OR OTHER VIOLATION OF THE DUE PROCESS JUSTIFICATIONS FOR CLASS ACTIONS.

In Point IV of their Brief, Relators argue, first, that the strategic decisions made by Plaintiffs and SFBB may result in there being proceedings outside of this case in which claims against some defendants are asserted, and that this would be inconsistent with the interests of efficiency and economy. Rel. Br., p. 76. While Relators have not pointed to

any such proceedings, even to the extent that is so, it provides no basis for concluding that the trial court abused its discretion in granting class certification, and that this Court should undo class certification via a writ of prohibition.

The justifications underlying Plaintiffs' and SFBB's decision to proceed in the manner they did have been discussed previously. SFBB believed, at the time the pertinent decisions were made, that without them, the bondholders would have no viable means of seeking to recoup their losses and damages stemming from the Bond default. While those decisions were made without the benefit of hindsight, hindsight now has shown the judgments that were made to be quite sound.

Obviously, the interests of efficiency and economy are among the factors to be considered in assessing whether a case should proceed as a class action, but they are not the only factors. Moreover, even if there were two or several proceedings that ultimately ensued, that is still vastly more economical and efficient than compelling the bondholders to pursue 650 separate actions.

We note that even if Relators were correct that multiple proceedings might ensue, Relators would not be parties to more than one case, so long as this action is allowed to proceed as a class action. At most, some of the bondholders may become parties to more than one proceeding. Thus, viewed in context, it is clear that Relators have little genuine concern for the interests of efficiency and economy. Rather, they simply are looking for any argument they possibly can seize upon to derail this action, so as to insulate themselves from being held answerable for their own defalcations concerning the Bonds.

Relators further argue that Plaintiffs and/or their counsel have abused the class action process. However, the factual premises underlying this argument are without foundation. For instance, Relators argue that someone other than the named Plaintiffs and their counsel "are in control of the litigation." Rel. Br., p. 77. As discussed above, that simply is not so. Relators have identified no facts suggesting that Liss or the Brokers are controlling this litigation. Indeed, Relators never even have sought to depose Liss to attempt to develop any such facts.

SFBB made various strategic decisions as to the best means for seeking to recoup the bondholders' damages, exercising their independent professional judgment in doing so. SFBB has vigorously pursued numerous claims against multiple parties, devoting more than $400,000 of uncompensated attorney time and more than $35,000 of unreimbursed expenses to this matter in the process. *See* discussion at pp. 31, *supra*.

Relators further argue that the statutes of limitation have been allowed to run on claims against Liss. However, among the flaws in this argument is that Wisconsin, where Liss resided and did business, has a six year limitations period for fraud claims, which begins to run only upon the discovery by the aggrieved party of the facts constituting the fraud. W.S.A. § 893.93(1)(b).

Relators also argue that by assisting with this litigation, "the brokers and Underwriter were able to free themselves from potential liability." Rel. Br., p. 77. However, that simply is not so. Liss and various brokers have been made parties to this litigation as third-party defendants. Appendix, Tab 1. Accordingly, not only are those parties not free from litigation or potential liability, Relators have a readily available

means of pursuing any claims they may feel they have that other parties should be liable for contribution or indemnity with respect to damages Relators ultimately are required to pay to the bondholders.[13]

Relators additionally argue that "the brokers and Underwriter were able to effect a release from potential class claims . . . ." Rel. Br., p. 77. However, that clearly is not what the relevant understandings entailed. As SFBB's correspondence made clear, the assistance being provided meant that SFBB "will not be in a position to consider or pursue any potential claims against any such parties . . . ." Ex. 18, p. 2. However, Plaintiffs' participation in this lawsuit did not preclude them "from considering or pursuing claims against such persons with other counsel." Ex. 19, p. 1. Neither the Brokers nor Liss have been released from anything.

Bottom line, Relators argue that the arrangement should have been subject to the thorough review of the court. Rel. Br., p. 78. Indeed, that is exactly what happened in the trial court during the proceedings regarding class certification. Judge Kendrick heard extensive testimony, received numerous exhibits, and allowed extensive briefing and oral argument. Relators were afforded an opportunity to fully air their multi-faceted, self-serving and sometimes inconsistent arguments as to why class certification should be

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[13] That Liss and various brokers have been made parties to this case cannot have come as any great surprise to them. Common sense dictates that once litigation over the Bond default began, they stood a good chance of being brought into it. It would seem that the safest course for them would have been for there to be *no* litigation.

denied. At the conclusion of all that, after due consideration, Judge Kendrick exercised his discretion so as to grant class certification and conclude that Plaintiff and SFBB will properly represent the class. No proper basis exists for disturbing Judge Kendrick's exercise of his discretion in this writ proceeding.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the preliminary writ should be quashed and Relators' petition should be denied.

Respectfully submitted,

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RULE 84.06 CERTIFICATE

I hereby certify that the foregoing brief complies with the limitations contained in Mo. Sup. Ct. R. 84.06(b), and that the number of words in this brief is 17,219 (Microsoft Word). I further certify, in accordance with Mo. Sup. Ct. R. 84.06(g), that a floppy disk containing this brief is being filed, and that the disk has been scanned for viruses and is virus-free.

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Circuit Judge, Division No. 17
St. Louis County Circuit Court
7900 Carondelet Avenue
St. Louis, MO 63105

Cutter & Company, Inc.
15510 Olive Street Road, Ste. 204
St. Louis, MO 63017
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APPENDIX

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