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

RELATORS' BRIEF

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JURISDICTIONAL STATEMENT

This action involves a request that this Court issue an extraordinary, original, remedial writ of prohibition requiring the circuit court to conform its conduct to the laws of this State and the United States. The underlying issues concern certification of a plaintiff class represented by counsel suffering under an incurable conflict of interest. This Court has jurisdiction pursuant to Article V, § 4 of the Missouri Constitution.

STATEMENT OF FACTS

The Petition for a Writ of Prohibition concerns the Circuit Court's decision, in a class action lawsuit by bondholders who lost money on certain bond investments, to certify a plaintiff class represented by eight bondholders and their attorneys who made a deal not to sue potential defendants, including the bond underwriter, in exchange for recruiting the class representatives and for payment of attorneys' fees.

I. The Plaintiff-Class Claims Arise From Certain Bonds Purchased By The Plaintiffs.

As alleged in Plaintiffs' Second Amended Class Action Petition, this action arises out of the issuance and sale of approximately $14 million of bonds by the Arch Leasing Corporation Trust ("ALCT"). (Writ Pet. Ex. B at 1 (¶1).) These were collateralized trust bonds issued to raise capital for a computer equipment leasing venture. (Writ Pet. Ex. B at ¶20.) ALCT was organized to issue bonds to raise money for a venture involving a related entity, St. Louis Leasing Corporation ("SLC"). (Writ Pet. & Answer at ¶9.)[1]

SLC was to provide lease brokerage services to ALCT and to remarket leased equipment. (Writ Pet. Ex. B ¶24.) ALCT was organized by the principals of SLC, including Robert A. Chlebowski and Lynn Frownfelter, with the assistance of Jerry Liss.

[1] Where undisputed facts are supported by allegations in Relators' Petition for a Writ of Prohibition and Plaintiffs' Answer to Petition for Writ of Prohibition admits or fails to deny those allegations, this Brief provides a combined citation in the form of (Writ Pet. & Answer at ¶__).

Liss is an SLC shareholder, a former member of SLC's Board of Directors, and the principal owner of J.E. Liss & Co., an investment banking and brokerage firm and Underwriter for the bonds. (Writ Pet. & Answer at ¶9.)

A. The Bond Sale Was Structured To Allow Computer Purchases That Would Further A Computer Leasing Venture.

The bond proceeds were to be used for part of the purchase price of new computers (the remainder of the purchase price was borrowed from banks), which were then leased to large companies such as General Electric for varying lengths of time ranging from 28 to 42 months. (Writ Pet. & Answer at ¶10.) The lease payments were used to pay the bank debt and some of the interest due on the bonds. (Writ Pet. & Answer at ¶10.) SLC played a key role because it was the entity that actually oversaw the purchase of the computers and marketed them to the lessees. (Writ Pet. & Answer at ¶10.)

The bondholders were to receive only interest payments for three years. (Writ Pet. & Answer at ¶11.) At the end of three years, the entire principal was to be repaid. (Writ Pet. & Answer at ¶11.) The money for paying off the principal was to come from the "residual value" of the computers. The "residual value" was the amount for which the computers could be resold or released at the expiration of the original lease. (Writ Pet. & Answer at ¶11.) As each lease was entered, Marshall & Stevens, Inc. was to provide an appraisal or estimate of what the residual value of the computers would be at the end of the lease. (Writ Pet. & Answer at ¶11.)

ALCT had three trustees. ALCT's statutory trustee was Delaware Bank, whose presence allowed ALCT to be organized as a Delaware business trust. (Writ Pet. & Answer at ¶12.) ALCT's managing trustee was Arch Management Corporation ("AMC"), an affiliate of SLC that shared SLC's offices and personnel. AMC had day-to-day responsibility for collecting the bond proceeds, paying them out, and generally handling the business affairs of ALCT. (Writ Pet. & Answer at ¶12.) Finally, ALCT's indenture trustee was Magna Bank (now Union Planters Bank, N.A., or the "Bank"), whose duties, as outlined in the Indenture Trust Agreement and under the Indenture Trust Act, are part of the disputed facts of this litigation. (Writ Pet. & Answer at ¶12.) Nevertheless, the Bank made sure there was sufficient money deposited by the managing trustee in certain accounts so that the monthly interest could be paid, and it actually issued the monthly interest checks. (Writ Pet. & Answer at ¶12.)

ALCT issued $14,011,000 in bonds in fifteen closings beginning May 19, 1995 and ending on November 30, 1995. (Writ Pet. & Answers at ¶13.) ALCT's bonds were issued through its underwriter, J.E. Liss & Co. (the "Underwriter"). Under the Managing Placement Agreement (Ex. 12), the purchasers of the bonds were to sign a subscription agreement with their brokers and to give their brokers a check for the face amount of the bonds to be purchased. (Writ Pet. & Answer at ¶13.) The money was then to be sent to an escrow agent.[2] (Writ Pet. & Answer at ¶13.) The Managing Placement Agreement, the

[2] The Grafton State Bank in Wisconsin served as escrow agent, but is not involved in this litigation.

Indenture, and Basic Documents anticipated that at periodic closings, ALCT would deliver certain opinions from its officers (Chlebowski and Frownfelter) as well as its counsel, Michael J. Doster and Doster, P.C., to Underwriter. (Writ Pet. & Answer at ¶13.) After each closing, the money was to be sent to the Managing Trustee and the Bank was directed to issue the bonds. (Writ Pet. & Answer at ¶13.)

B. Plaintiffs' Claims Are Based In Large Part Upon The Early Diversion of Funds From ALCT Computer Purchases To SLC Operating Expenses, Information Underwriter's Counsel Allegedly Divulged In July 1995.

During 1995, SLC used $3.6 million dollars of the bond proceeds for purposes other than the purchase of computers. (Writ Pet. & Answer at ¶14.) This litigation includes a factual and legal dispute over the responsibility for the diversion of those funds. (Writ Pet. & Answer at ¶13.) Plaintiffs allege that the Bank was responsible for the diversion because, under the Indenture, bond funds were placed in an account under the Bank's dominion and control. They allege that Underwriter's counsel, Robert Phillip, called and advised the Bank officer handling the account that ALCT's public financial statements showed SLC was improperly using money from that account. (Writ Pet. at ¶14 & Writ Answer at ¶14(1)-(2).) However, Relators maintain that AMC as the Managing Trustee — not the Bank — allowed SLC to divert the funds. (Writ Pet. & Answer at ¶14.)

In large part, Plaintiffs' claims are based upon this diversion of funds. (Writ Pet. & Answer at ¶15.) Plaintiffs allege that the fund diversion was a default event under the Indenture, such that no further bonds should have been issued. (Writ Pet. & Answer at

¶15.) It is undisputed that at least $8,995,000 worth of ALCT's bonds were issued through Underwriter ***after*** Underwriter's counsel allegedly advised the Bank of the fund diversion. (Writ Pet. & Answer at ¶15.) The parties continue to dispute whether Underwriter's counsel was required to give, and in fact gave, Underwriter opinions regarding the false or misleading nature of the prospectus for the bonds after allegedly telling the Bank that SLC was improperly using the bond funds. (Writ Pet. & Answer at ¶13 & 15.)

On January 2, 1996, SLC filed for bankruptcy protection. (Writ Pet. & Answer at ¶16.) In that bankruptcy proceeding, the $3.6 million diverted ALCT funds were a claim against the SLC estate.

C. Other Plaintiff Claims Are Based Upon The Involvement of Relators In A Separate Equity Case In Which The St. Louis County Court Authorized Liquidating ALCT's Insufficient Collateral And Distributing The Proceeds To Bondholders *Pro Rata*.

The first bonds were supposed to be paid off on May 19, 1998. (Writ Pet. & Answer at ¶17.) However, ALCT did not have sufficient funds to pay both those bondholders and the interest and principal due on other bonds scheduled for payoff later in the year. (Writ Pet. & Answer at ¶17.) Therefore, on May 18, 1998, ALCT filed a suit in equity (St. Louis County, Missouri, Circuit Court, Case No. 98CC-1702 (the "Equity Case")), against the Bank to compel the Bank to distribute available funds to all bondholders on a *pro rata* basis. (Writ Pet. & Answer at ¶17.) The Bank filed a counterclaim for instructions. (Writ Pet. & Answer at ¶17.) When the first principal payment for the maturing bonds was missed, the Bank declared a default, accelerating the principal due date on all of the bonds. (Writ Pet. Ex. B at ¶29.)

At that point, much of the leased computer equipment for which the lease terms had expired was still in the possession of, and being used by the lessees on a month-to-month basis. (Writ Pet. Ex. B at ¶67.) It was necessary to decide whether to liquidate the remaining lease residuals for a lump sum or to continue to administer the portfolio and receive payments from the holdover leases. (Writ Pet. Ex. B at ¶67.)

With the authorization of the court in the Equity Case, the Bank sold the collateral consisting of the computer equipment and lease portfolio. (Writ Pet. & Answer at ¶18.) The Bank continued to make payments to the bondholders after the default. (Writ Pet. & Answer at ¶18.) The bondholders received approximately $5 million from the liquidation of the collateral and other monies on hand. (Writ Pet. & Answer at ¶18.) The Equity Case was concluded in 2002 and the court discharged the Bank from further duties as Indenture Trustee. (Writ Pet. & Answer at ¶18.)

II. The Plaintiff Class Came To Be Represented By Individual Plaintiffs Who Were Solicited By, And Class Counsel Who Was Hired By, Potential Defendants.

A. Plaintiffs' Class Counsel Initially Became Involved With This Litigation When He Was Hired By Various Brokers To Represent Specific Bondholders In The Equity Case.

Three of the brokers who sold bonds to the public — David Bax, William Glaser and William Meyer — had originally hired another attorney to intervene in the equity action on their behalf. The brokers' motion to intervene in their own right was denied for lack of standing (Hearing Transcript,[3] Ex. 32 at 100), that effort was abandoned, and the first attorney hired by the brokers left the case because of a conflict.

These brokers then hired Gerald P. Greiman[4] to represent certain bondholders to oppose the sale of collateral in the Equity Case. (Ex. 1,Bax Dep. at 55-56; Ex. 21,

[3] Exhibits 31 through 34 are the transcript of the hearing before the Circuit Court on the Motion to Certify the Class and will hereafter simply be referenced by the Exhibit number.

[4] The brokers hired Greiman and his law firm (Ex. 21, Greiman Dep. II Ex. AA (copy in Br. App. at A-8 through A-10)), now Spencer Fane Britt & Brown LLP (Ex. E at 4). In the class certification at issue in this proceeding, the Circuit Court appointed Gerald P. Greiman, Daniel V. Conlisk, and their firm to represent the class. (*Id.*) Greiman has been

Greiman Dep. (10/2/01, hereafter "Greiman Dep. II,") at 8-9.) Greiman was paid $20,000 by a consortium of brokers, including Liss, for his participation in the proceedings in the Equity Case. (Ex. 1, Bax Dep. at 56-57, 123-124.)

The brokers put Greiman in contact with certain bondholders. (Ex. 32 at 100-101.) Greiman filed a motion to intervene on behalf of six specifically named, broker-selected bondholders (Susan J. Duever, Donald R. Glaser, Drew E. Santee, The Audit Group, Inc., and John Schultheis) in the Equity Case on September 16, 1998. (*ALCT v. Magna Bank, N.A.*, Case No. 98CC-001702, St. Louis Co., Mo. Cir. Ct., Div. 39 (Bondholder's Mot. to Intervene, filed Sept. 16, 1998).) On that same day Greiman sent an engagement letter to at least Donald Glaser in which he discussed his representation. (Ex. 21,Greiman Dep. II at 14.) Grieman explained that he would be representing Glaser and certain other bondholders in the Equity Case. (Ex. 21, Greiman Dep. II Ex. AA (copy in Br. App. at A-8 through A-10).) In addition, Greiman stated:

> We also will take reasonable steps to investigate and evaluate potential claims against third parties who may be culpable with respect to any losses suffered on the bonds. Such potential claims may include claims for negligence, breach of fiduciary duties, securities fraud and/or other

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lead counsel throughout this case and this brief refers to all of these attorneys as "Greiman" or "Class Counsel," either singular or plural, unless the context requires a more specific reference.

> claims, asserted against Magna Bank, Robert Chlebowski and/or others.
>
> We will provide you with our analysis and evaluation as to potential claims and the prospects for success on them.

(*Id.* at 1.)

In the same letter, Greiman explained that Bax, Meyer, and William Glaser had agreed to pay a $20,000 retainer that would be applied to Greiman's fees, but emphasized that the bondholders would be entitled to make all client decisions in the matter. (*Id.*) Greiman did not inform those six named bondholders that he already had an implicit agreement with the fee-paying brokers that Greiman would not sue them on behalf of the bondholders. Similarly, Greiman did not inform those six, named bondholders that he would not even evaluate any claims they might have against those brokers. Donald Glaser signed this letter agreeing to the engagement on September 22, 1998, but there was no further communication between Greiman and any of his clients, the bondholders, between that date and July 6, 1999.[5] (Ex. 21, Greiman Dep. II at 52-53.)

[5] The Circuit Court in the Equity Case denied the bondholders' motion to intervene. Grieman apparently never informed those six bondholders and never appealed the denial of their motion.

B. Although Class Counsel Determined There Was A Basis To Go Forward With A Class Action, He Did Not Discuss The Results Of His Investigation With His Clients Before He Further Compromised His Ability To Represent Bondholders By Soliciting Additional Financial Support And Information From Otherwise Potential Defendants.

As Greiman pursued his investigation into potential claims on behalf of the bondholders, he had access to a tremendous amount of information that was either available to the public or available from the bondholders themselves. Between October and December 18, 1998, Greiman and his firm spent more than 85 hours collecting a substantial amount of information relating to the bonds, including key documents such as the prospectus, the indenture, ALCT's 10-Qs and 10-Ks, and information from the Bankruptcy Court file relating to the diversion of the trust funds. (Ex. 21, Greiman Dep. II at 17-19; Ex. 20; Ex. 33 at 164-166.)

Greiman was aware that an underwriter in a bond offering and its counsel are often defendants in class action lawsuits concerning the sale of the bonds because he was previously involved in a case where his firm sued a bond underwriter and that underwriter's counsel. (Ex. 21, Greiman Dep. II at 149.) Nevertheless, without discussing the issue with his clients, Greiman decided to solicit information from Underwriter with the implicit understanding that he would not sue Underwriter on behalf the bondholders. In fact, before reporting the results of his claim investigation and analysis to his clients, Greiman made his implicit understanding explicit. Greiman first explicitly agreed not to sue Liss and the brokers on December 18, 1998. (Ex. 21, Greiman Dep. II 36, 120.)

On December 18, 1998, after concluding the claims assessment, Greiman met with Bax, Glaser, and Underwriter President Jerry Liss. (Ex. 32 at 129.) Greiman offered his and his firm's services to file a class action on behalf of the bondholders against everyone involved in the bond issue except Underwriter and the brokers. (Ex. 32 at 129-130, 133.) Greiman's firm agreed to take the case, in exchange for the payment of an additional $100,000 (at least $60,000 of which came from Liss). (Ex. 32 at 130-133; Ex. 33 at 162; Ex. 34 at 61.) Underwriter and the brokers agreed that the "loans" (the payment of the attorneys' fees retainer) would only need to be repaid from the proceeds, if any, plaintiffs might recover in this case. (Ex. 34 at 63.) This retainer agreement between Class Counsel and Underwriter and brokers was never put in writing. (Ex. 33 at 199-200.)

By the time Greiman agreed to this "deal" with Underwriter and the brokers in December 1998, Greiman had decided there was a basis for going forward, (Ex. 21, Greiman Dep. II at 45-46), but he would do nothing else unless somebody paid him an additional $100,000. (Ex. 33 at 231.) Indeed, *before* the brokers, Underwriter, and Greiman articulated their understanding, Greiman had available *all* of the information that eventually formed the basis for the petition filed the following year. (*See* Ex. 32 at 115-120; Ex. 33 at 164-167; Ex. 21, Greiman Dep. II at 17-22.)

C. After Class Counsel And Underwriter Made Explicit Their "Understanding" That Class Counsel Would Not File Any Class Claims Against Underwriter, Class Counsel Waited For Underwriter And Brokers To Solicit Potential Class Representatives Rather Than Consulting With Any Of The Bondholders Class Counsel Originally Purported To Represent.

Despite his appearance in the Equity Case on behalf of six specifically named bondholders, Greiman asserts that during the time he was being paid and directed by the brokers to investigate a potential class action, Greiman had no clients, only an expectation that the brokers would provide the clients when the time came. Greiman testified that when he reached an explicit agreement not to sue the brokers and Underwriter on December 1998, "Our clients were bondholders to be determined." (Ex. 21, Greiman Dep. II at 8; Ex. 33 at 163-164.) Although the "deal" was not struck until December 18, 1998 Greiman's testimony confirms that, from the very beginning, Underwriter and the brokers steered his investigation. Despite his previous representations to bondholders, Greiman made no effort to investigate claims against the brokers, Underwriter, or anyone affiliated with them, including Underwriter's attorney, whom plaintiffs allege knew about the diversion of trust assets as early as July 1995. (Ex. 21, Greiman Dep. II at 10, at 27-28, 30-32; Ex. 33 at 179-180.)

After December 18, Underwriter and the brokers proceeded to hand pick the bondholders for consideration as named class representatives. (Ex. 33 at 204-205.)

Greiman did not consult with a single bondholder during this phase. Between December 18, 1998 and May 5, 1999 (about the time when Underwriter and the brokers finally paid the money Greiman demanded), Greiman did virtually no work on the case. His records show a mere 1.95 hours expended during that time. (Ex. 20.)

After the brokers and Underwriter identified potential class representatives (and paid Greiman the additional $100,000), Greiman sent a July 6, 1999 engagement letter to nine potential class representatives. Of these potential class representatives, three were among the six bondholders Greiman represented in the Equity Case and during the initial investigation and analysis of potential claims: Susan Duever,[6] John Schultheis,[7] and Donald R. Glaser.[8] Two others, Norma Ducommun and Commercial Mortgage &

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[6] Duever bought bonds for both herself and her father's estate from William Glaser, one of the brokers who initially hired Greiman.(Ex. 3, Duever Dep. at 13, 17-18).

[7] Schultheis contributed $100 towards attorneys fees, but he did not realize that the class would not be suing Liss until the day his deposition was taken in December 2000. (Ex. 10, Schultheis Dep. at 69, 134).

[8] Glaser had signed the original, September 16, 1998 engagement letter in which Greiman had agreed to provide Glaser with an analysis of potential claims. However, the July 6, 1999 engagement letter was the first communication between Greiman and Glaser since that time. (Ex. 21, Greiman Dep. II 52-53.) Glaser bought bonds from his son, William Glaser, one of the brokers who initially hired Greiman and who is part of the group of brokers that Greiman agreed not to sue (Ex. 4, Glaser Dep. at 8).

Finance Company, had voted in the Equity Case to approve the decision to liquidate ALCT's assets. (Ex. 2, Ducommun Dep. at 82-83; Ex. 8, Hogfeldt Dep. at 108, 158, 162.) Another, Rona Hodes, had a Series 6 NASD license that was held by Underwriter, received commissions from the sale of the bonds, was employed by it as a registered representative and broker during the period at issue in the lawsuit, and is part of the group of brokers that Greiman agreed not to sue.[9] (Ex. 6, Hodes Dep. at 88-89; Ex. 7, Hodes Dep. 270-71.) Yet another, Gary Yamine, dropped out of this case after Relators sought to take his deposition. (Writ Pet. & Answer at ¶26.)

1. Greiman's First Class-Action Engagement Letter Failed To Inform Putative Class Representatives That Underwriter Had Paid Over One-Half Of Attorneys' Fees The Retainer And That Greiman Would Not Sue Underwriter.

The July 6, 1999 engagement letters were the first direct communications from Greiman's firm to the named plaintiffs. (Writ Pet. & Answer at ¶24.) The engagement letters stated:

> At the outset of our representation, certain bondholders, as well as certain brokers involved in selling the

[9] Hodes bought the bonds while she was a Liss broker and received commissions from the sale of those bonds. (Ex. 6, Hodes Dep. at 88-89, Ex. 7, Hodes Dep. at 270-71.) She also served on the creditors committee for the SLC bankruptcy. (Ex. 6, Hodes Dep. 100-01.)

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 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. Similarly, in light of 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.

(Writ Pet. & Answer at ¶24; Ex. 18 at 2.)

2. Greiman's Follow-up Letter Informed Putative Class Representatives That Greiman Would Not Sue Underwriter And Told Them There Was A Class Action Pending Against Underwriter In Another State, But Did Not Explain That The Other Class Action Did Not Involve Their Bonds.

After Greiman sent this first engagement letter, he had telephone conversations with Yamine and Hodes. (Ex. 32 at 148.) During those conversations, Liss's name was mentioned "in some disparaging context." (Ex. 32 at 150.) Greiman then sent a second letter on October 6, 1999. (Writ Pet. & Answer at ¶26.) This "follow-up" letter included a draft of the proposed class-action petition in this case, and stated:

> 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 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.

(Writ Pet. & Answer at ¶26; Ex. 19 at 1-2.)

Although Greiman did enclose a copy of the pleadings in the Wisconsin class action that had been filed against Underwriter, Greiman did not explain that the claims in that class action had to do with "Arch funds" involving investments in SLC sold by Liss while he was an SLC Director, as opposed to the ALCT bonds underwritten and sold by Liss which are the subject of this lawsuit. (Ex. 32 at 150; Ex. 21, Greiman Dep. II at 69-70.)

III. Plaintiffs Solicited By Potential Defendants And Class Counsel Hired By Potential Defendants Filed This Lawsuit Against Relators, But Not Against The Potential Defendants Who Were Funding The Litigation.

The lawsuit was filed in November 1999. (Writ Pet. Ex. A.) Plaintiffs filed a motion for class certification on June 16, 2000. (Writ Pet. Ex. D.) Relators took Mr. Greiman's deposition in October 2000, but he asserted the attorney-client and work-product privilege as to the nature of his investigation, if any, of Underwriter's involvement and potential liability. (*See* Ex. 31 at 29-33.) Relators also took the depositions of named plaintiffs. (Exs. 2-4, 6-10.) At the first hearing, Class Counsel sought to justify the agreement, but Respondent ruled that they could not do so without waiving the privileges asserted at the first deposition and giving defendants an opportunity to explore those reasons in a deposition. (Ex. 31 at 43.)

Greiman's deposition was taken for a second time in 2001 (Ex. 21) and he testified at length in the second and third hearings (Exs. 32-34). Greiman admitted that Class Counsel's decision not to sue Underwriter was *not* based upon an assessment that Underwriter was blameless. (Ex. 21, Greiman Dep. II at 135.) Greiman was aware that the bond Underwriter and its counsel were potential defendants because in a prior class action case, Greiman's firm sued the bond underwriter and its counsel on behalf of bondholders. (Ex. 21, Greiman Dep. II at 149.) Although Greiman also realized that the claim resulting from the diversion of funds could have been a potential class-wide claim against Underwriter and Underwriter's counsel (Ex. 21, Greiman Dep. II at 33-34), Class Counsel did not investigate or consider whether bondholders had a claim against Underwriter. (Ex. 21, Greiman Dep. II at 28.) Rather, Greiman's decision was based upon the fact that these potential defendants paid him money in exchange for his firm's agreement not "to consider or pursue any potential claims" against them. *See* Ex. 18 at 2. Greiman testified that "the agreement not to pursue claims against [Underwriter] was in respect of them contributing money to him to fund litigation." (Ex. 5, Greiman Dep. (10/26/00) at 40.)

Subsequently Greiman raised several excuses for why he agreed not to sue Underwriter. First, Greiman claimed Underwriter would have arbitration agreements with the class members and that would preclude a class action suit. (Ex. 32 at 125.) However, Greiman never saw any arbitration agreements regarding Liss. (Ex. 32 at 122). He assumed there were arbitration agreements with Underwriter because a number of arbitrations were filed against Underwriter. (Ex. 32 at 123.) Second, Greiman asserted that there would be personal jurisdiction problems regarding Underwriter. (Ex. 32 at 121.) However, Greiman later conceded that personal jurisdiction would not be a problem with Liss. (Ex. 33 at 193.) Finally, Greiman suggested that Underwriter could not satisfy a judgment financially. (Ex. 32 at 121.) However, Greiman never investigated the financial situation of Underwriter or the availability of insurance (Ex. 33 at 196-97, 229-30) and never looked at any financial statements or financial reports regarding Underwriter. (Ex. 21, Greiman Dep. II at 144.)

The court also received other evidence at the third hearing, rejected defendants' proffer of expert testimony from Professor Clark Cunningham (an expert on legal ethics), (Ex. 31 at 44-50), and received several lengthy briefs from the parties in 2002.

On May 12, 2003, Respondent entered an order and certified a class and directed that the "relevant circumstances" regarding Class Counsel's agreement with Underwriter and brokers be "fully disclosed" in the notice to the class, and "any class member who may disagree with the strategic decision made by the class representatives and plaintiffs' counsel may elect to opt out of the class." (Writ Pet. Ex. E at 2-3.)

Plaintiffs submitted their proposed class notice on June 2, 2003. (*See* Writ Pet. Ex. F.) Relators filed objections to the proposed class notice shortly thereafter. Respondent held a hearing on the objections, but as of the filing of this petition he has not ruled on the objections.

POINTS RELIED ON

I. Relators Are Entitled To An Order Making This Court's Preliminary Writ Absolute And Prohibiting Respondent From Enforcing His Order Granting Class Certification, Because By Accepting Payment From Potential Defendants, Class Counsel Created A Conflict of Interest That Prevents Him From Fairly And Adequately Representing The Absent Class Members, In That (A) His Relationship With Potential Defendants Kept Him From Pursuing Any Potential Claims Against Those Defendants, (B) He Failed To Protect His Clients' Confidential Information, and (C) He Failed To Secure His Clients' Informed Consent.

American Family Mutual Ins. Co. v. Clark, 106 S.W.3d 483 (Mo. banc 2003).

Vermont v. Homeside Lending, Inc., 826 A.2d 997 (Vt. 2003).

Zucker v. Occidental Petroleum Corp., 192 F.3d 1323 (9th Cir. 1999).

Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634 (W.D. Penn. 1973).

Mo. S. Ct. R. 4-1.7(b).

Mo. S. Ct. R. 4-1.8(f).

Mo. S. Ct. R. 52.08(a).

II. Relators Are Entitled To An Order Making This Court's Preliminary Writ Absolute And Prohibiting Respondent From Enforcing His Order Granting Class Certification, Because The Class Representatives Cannot Fairly And Adequately Represent The Absent Class Members, In That The Named Plaintiffs Were Chosen By Potential Defendants; Class Counsel Has An Incurable Conflict Of Interest And Is Controlling The Litigation; And, By Agreeing To The Deal Class Counsel Struck With Potential Defendants, The Named Plaintiffs Tainted Themselves With The Same Conflict Of Interest.

Vermont v. Homeside Lending, Inc., 826 A.2d 997 (Vt. 2003).

Culver v. City of Milwaukee, 277 F.3d 908 (7th Cir. 2002).

Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3d Cir. 1973).

Mo. S. Ct. R. 52.08(a).

III. Relators Are Entitled To An Order Making This Court's Preliminary Writ Absolute And Prohibiting Respondent From Enforcing His Order Granting Class Certification, Because He Allowed This Lawsuit To Proceed As A Class Action With Representation So Inadequate That Any Judgment Would Be Void, In That Respondent Failed To Finally Decide Whether Class Counsel's Ability To Adequately Represent Absent Class Members Was Limited By The Obvious Conflict Of Interest Class Counsel Created When He Agreed Not To Sue Potential Defendants In Exchange For Assistance In Financing The Litigation And Soliciting The Class Representatives, And Respondent Required Absent Class Members To Decide For Themselves Whether Counsel's Conflict And Inability To Pursue All Potential Class Claims Left Counsel Unfit To Represent Their Interests.

American Family Mutual Ins. Co. v. Clark, 106 S.W.3d 483 (Mo. banc 2003).

City of Excelsior Springs v. Elms Redevelopment Corp., 18 S.W.3d 53 (Mo. App., W.D. 2000).

Byrd v. Chadwick, 956 S.W.2d 369 (Mo. App. W.D. 1997).

Palumbo v. Tele-Communications, 157 F.R.D. 129 (D. D.C. 1994).

Mo. S. Ct. R. 52.08.

IV. Relators Are Entitled To An Order Making This Court's Preliminary Writ Absolute And Prohibiting Respondent From Enforcing His Order Granting Class Certification, Because Class Counsel's Unwritten Deal With Potential Class Defendants Abuses The Class Action Process Violating The Due Process Justification For Class Actions, In That It Creates A *De Facto* Settlement Class Exempt From Judicial Oversight.

American Family Mutual Ins. Co. v. Clark, 106 S.W.3d 483 (Mo. banc 2003).

Davis v. Comed, Inc., 619 F.2d 588 (6^{th} Cir. 1980).

Greenfield v. Villager Industries, Inc., 483 F.2d 824, 833 (3d Cir. 1973).

Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634 (W.D. Penn. 1973).

Mo. S. Ct. R. 52.08.

ARGUMENT

Class Counsel cannot fairly and adequately represent the interests of absent class members when he admits that his relationship with potential class defendants prevents him, not only from pursuing those potential claims, but even from advising his clients that those claims exist or whether they should pursue those claims. The "attorneys and parties seeking to represent the class assume fiduciary responsibilities and the court bears a residual responsibility to protect the interests of class members . . . ." MANUAL FOR COMPLEX LITIGATION (3d ed.) § 30.

Named plaintiffs and counsel were recruited and hired by potential class defendants. Current Class Counsel, and the named plaintiffs who agreed to be represented by those attorneys, compromised their ability to choose which class claims they would pursue. Together, Class Counsel and the named plaintiffs, in exchange for financial support that would reduce their personal financial risk, essentially waived absent class members' potential claims, before the class was even certified, without the absent class members' knowledge or consent. Such an arrangement cannot comport with the basic requirements of due process. The deal Class Counsel struck — not to sue his financial backers — creates a conflict of interest between Class Counsel and the absent class members such that Class Counsel is unable to fairly and adequately represent the absent class members. Having condoned this deal after the fact, the named class members (recruited by Underwriter and brokers) are complicit in Class Counsel's conflict and are similarly inadequate representatives for the absent class members.

The Circuit Court erroneously concluded that this case could proceed as a class action with the current named plaintiffs and current class counsel representing the interests of the absent class members. The Circuit Court's Order incorrectly treats Class Counsel's commitment not to sue potential class defendants as a strategic decision, rather than a limitation on counsel's ability to represent class plaintiffs. As a result, the Circuit Court required the absent class members to decide for themselves whether Class Counsel's conflict and inability to pursue all potential class claims left counsel unfit to represent their interests. Plaintiffs are not attorneys and cannot appreciate the advantages and perils of those decisions without the assistance of counsel.

Moreover, the extent to which the brokers and Underwriter have been able to direct the conduct of this lawsuit has created a quasi-settlement class exempt from judicial oversight and class-member approval that abuses the class action process.

Standard of Review

This Court applies the same standard of review to each point raised in this brief. Although the "[d]etermination of whether an action should proceed as a class action under Rule 52.08[10] ultimately rests within the sound discretion of the trial court,"

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[10] Rule 52.08 governs class actions in Missouri courts; however, Missouri courts interpreting Rule 52.08 consider federal court interpretations of Federal Rule of Civil Procedure 23, because the two rules are identical. *Koehr v. Emmons*, 55 S.W.3d 859, 864 n. 7 (Mo. App. E.D. 2001) (citing *Byrd v. Chadwick*, 956 S.W.2d 369, 378 (Mo. App. 1997).

American Family Mutual Ins. Co. v. Clark, 106 S.W.3d 483, 486 (Mo. banc 2003) (internal quotes and quoted case omitted), a writ of prohibition is available to prevent abuses of judicial discretion, *Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001). More importantly in the context of this case, a writ of prohibition is the proper vehicle to review the adequacy of class representation and consequent propriety or impropriety of class action certification "to prevent unnecessary, inconvenient and expensive litigation." *See American Family,* 106 S.W.3d at 486.

I. Relators Are Entitled To An Order Making This Court's Preliminary Writ Absolute And Prohibiting Respondent From Enforcing His Order Granting Class Certification, Because By Accepting Payment From Potential Defendants, Class Counsel Created A Conflict of Interest That Prevents Him From Fairly And Adequately Representing The Absent Class Members, In That (A) His Relationship With Potential Defendants Kept Him From Pursuing Any Potential Claims Against Those Defendants, (B) He Failed To Protect His Clients' Confidential Information, and (C) He Failed To Secure His Clients' Informed Consent.

A. A Class Action, Such As This One, Cannot Proceed Without Fair And Adequate Representation.

Before a class action may proceed, a court must first determine that certain minimum requirements are met.

> Certification of a class action requires, at a minimum, that (1) the class be so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the class exist, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 52.08(a). *See also* section 507.070, RSMo 2000. These procedural rules are mandatory. *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791, 795 (Mo. banc 1995) (citations omitted). Class certification is appropriate only if the prospective class meets each listed element.

American Family, 106 S.W.3d at 486. Courts must conduct a rigorous analysis of class certification prerequisites before certifying a class. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Certification of a class action requires a determination, among other things, that the representative parties will fairly and adequately protect the interests of the class. *American Family*, 106 S.W.3d at 495 n.11 (Wolff, J., concurring).

Adequacy of representation is perhaps the most fundamental of the prerequisites for a class action. *See, e.g., Vermont v. Homeside Lending, Inc.*, 826 A.2d 997, 1012 (Vt. 2003).[11] There are two relevant aspects of representational adequacy here. The first is that

[11] This case was cited with approval in *American Family Mutual Ins. Co. v. Clark*, 106 S.W.3d 483, 493 (Mo. banc 2003) (Wolff, J., concurring).

the named class representatives must fairly and adequately protect the interests of the class. The second aspect of adequacy involves the class attorneys and includes competency, potential conflicts of class counsel and incentives for faithful representation of the entire class. *Id*. at 1012-13. Class actions raise significant due process concerns that cannot be brushed aside lightly, because class actions have the ability to bind absent class members. The due process rights of absent class members are violated if the class members are not adequately represented. *See Hansberry v. Lee*, 311 U.S. 32 (1940); *Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir. 1986); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86 (7th Cir. 1977).

These issues are of crucial importance to Relators (defendants) because, if the case would proceed as a class action, Relators need certainty that resolving this case will dispose of absent class members' claims. The resolution of a class action for damages is intended to have a binding *res judicata* effect on the absent members of the class. That means the members of the class who did not opt out of the class are bound by the judgment and cannot make the same claim in the future and cannot complain of its inadequacy. *American Family*, 106 S.W.2d at 490 (Wolff, J., concurring). If, subsequent to resolution of this case, a court in another state in another action were to hold that the class representatives or Class Counsel in this case inadequately represented absent class members, the judgment in this action would be void. *See, e.g., Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003). It would have no preclusive effect and Relators (defendants) would be exposed to a substantial risk of incurring multiple liability, would be exposed to multiple class action suits, and could be exposed to inconsistent results.

In *Vermont v. Homeside Lending, Inc.*, the court held that an Alabama class action judgment was subject to collateral attack in Vermont and permitted another lawsuit to proceed in the Vermont courts even though it involved the same matter as was resolved in the Alabama class action. 826 A.2d at 999, 1020. Although the court found three reasons why the Alabama judgment did not preclude an action in Vermont, the court indicated that any one of the three reasons would cause the same ruling. *Id.* at 1018. One of the three reasons was the inadequacy of representation by class representatives and class counsel. *Id.* at 1012-16.

The constitutionality of the class action device itself depends, among other things, upon whether the absent class members are adequately represented. *See American Family Mutual Ins. Co.*, 106 S.W.3d at 495 n.11 (Wolff, J., concurring). A class action judgment — whether for or against the class — in which the class members are inadequately represented is void and should be set aside on appeal. *See City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53, 59 (Mo. App. W.D. 2000). Indeed, adequate representation is so crucial to class actions that inadequate representation can give rise to a collateral attack on a class action judgment. *See, e.g., McNeil v. Guthrie*, 945 F.2d 1163, 1167 (10th Cir. 1991); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988); *Vermont,* 826 A.2d at 1005-06, 1012-16 (nation-wide class action judgment did not preclude subsequent suit partly because class counsel and class representatives in first suit were inadequate).

B. The Conflict Of Interest Class Counsel Created By Accepting Payment From Potential Defendants Has Limited, And Continues To Limit, His Ability To Fairly And Adequately Represent The Class.

"Responsibility for compliance" with "both the spirit and the letter of the procedural rules" governing class actions "is placed primarily . . . [and] especially upon counsel for the class, for, in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court." *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 831-32 (3d Cir. 1973) (footnote omitted). In this case, Class Counsel cannot fairly and adequately represent the absent class members because, by accepting money from a potential class defendant, Class Counsel created a conflict of interest preventing him from exercising his independent professional judgment on behalf of the class. *Stavrides v. Mellon Nat'l Bank & Trust Co.*, 60 F.R.D. 634, 636-37 (W.D. Penn. 1973) ("class action status should be denied where counsel's unethical conduct has been or is prejudicial to the interests of the class, or results in a conflict of interest between the attorney and the class and the attorney is therefore, obviously unable to protect the interests of the class").

Three specific violations of the Rules of Professional Conduct, that prohibit an attorney from undertaking representation like Class Counsel's representation of the class in this case, demonstrate how Class Counsel's conflict of interest prevents him from fairly and adequately representing the class. First, by accepting money from potential defendants, Class Counsel prevented the class from pursuing all potential class claims in one lawsuit with one set of attorneys. It even prevented Class Counsel from advising the class representatives and absent class members about those potential claims and the consequences of not pursuing them. Second, Class Counsel failed to protect client information. He further compromised class-member representation by advising his clients that he might share information with potential class defendants in a way that would later prevent class members from asserting attorney-client privilege. Third, Class Counsel never fully explained this arrangement with potential class defendants to the class members in a way that would allow them to give informed consent to such a conflict. These are "disabling breaches of the [Rules] of Professional [Conduct] which would prevent plaintiffs' counsel from vigorously and forthrightly taking up the cause of the class they seek to represent." *Stavrides,* 60 F.R.D. at 637 (internal quotes and quoted case omitted).

In general, an attorney's relationship with a third party, even when that third party is not a potential defendant, may create a conflict of interest that prevents the attorney from representing a potential client. The Rules of Professional Conduct recognize this problem, and explain that, "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to . . . a third person . . ., unless (1) the lawyer reasonably believes the representation will not be adversely affected [and] (2) the client consents after consultation." Mo. S. Ct. R. 4-1.7(b). The comment to that Rule explains how that prohibition applies in this context.

Sometimes, "[a] lawyer may be paid from a source other than the client, ***if*** the client is informed of that fact ***and*** consents ***and*** the arrangement does not compromise the lawyer's duty of loyalty to the client." Mo. S. Ct. R. 4-1.7 (comment) (citing Mo. S. Ct. R. 4-1.8(f)). However, as the comment clearly states, third-party payment prevents an attorney from representing a client if the fee arrangement impairs the attorney's loyalty to the client. "Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client." Mo. S. Ct. R. 4-1.7 (comment). In this case, Greiman accepted money and information from the brokers and Underwriter with the understanding that by doing so he would limit his ability to investigate and pursue any claims against them.

A deal like the one here between Class Counsel and Underwriter, in which an attorney limits his ability to represent his client in order to obtain payment from a third party for the attorney's representation, is a specifically listed "prohibited transaction" under the Rules of Professional Conduct. Missouri Supreme Court Rule 4-1.8(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.

By promising not to sue the brokers or Underwriter, Class Counsel compromised his independence and ability to freely exercise his professional judgment on behalf of the class. By surrendering his independent professional judgment, Class Counsel gave up his ability to fairly and adequately represent the absent class members.

Rule 4-1.8(f) removes any possible doubt that Rule 4.1-7(b) prohibits exactly the conduct that occurred here. Read together, the Rules make clear that a lawyer may accept payment from someone other than the client only in the most limited circumstances. A lawyer certainly may not do so when there is a significant risk that the interests of the client and the payor will diverge. *See McClendon v. Continental Group, Inc.,* 113 F.R.D. 39, 43 (D. N.J. 1986) (conflict arises when evidence *suggests* that third party paying for representation is linked to the injury plaintiffs allege); *Davis v. Comed, Inc.,* 619 F.2d 588, 596 (6th Cir. 1980) ("plaintiff does not fairly and adequately represent the [class] when the action is in fact controlled by another individual with antagonistic economic interests"); *see also Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000) (class counsel breaches its fiduciary duty to class by accepting excessive fees and costs to detriment of class plaintiffs).

1. Class Counsel Violated The Rules Of Professional Conduct By Allowing Class Counsel's Independent Professional Judgment To Be Limited By A Third Party With Interests Antagonistic To The Class In That Class Counsel Agreed To Ignore Class Claims Against Potential Defendants In Exchange For Those Potential Defendants Having Paid Class Counsel's Fees.

Class Counsel violated Rule 4-1.8(f) of the Rules of Professional Conduct by accepting payment from ***potential defendants*** in exchange for an agreement not to sue them. It is apparent that Class Counsel accepted compensation from non-clients with interests clearly antagonistic to the class as a whole. This is not a hypothetical conflict. This is not a potential conflict. This is an actual, direct conflict. The deal between Class Counsel and Underwriter prevents Class Counsel from fairly and adequately representing the class members because it has interfered, and continues to interfere, with Class Counsel's independent professional judgment. *See*, *e.g.*, *Stavrides*, 60 F.R.D. at 637 ("it is proper for courts to consider the ethical conduct of plaintiffs' counsel in deciding whether to certify a class"). Rule 4-1.8(f) recognizes that any agreement under which attorneys' fees are paid by a third party presents a potential conflict of interest and a potential danger.

That danger is more apparent where, as in this case, the plaintiffs' attorneys' fees are paid by potential defendants. *See Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 135 (Mo. banc 2000) ("[t]he danger is that the lawyer's own interest will prevail over the client's – or to put it another way, that the lawyer might be unduly influenced by an oversized fee to recommend an inadequate settlement for the client"). In a class action context, where the attorney for the class owes a fiduciary duty to absent class members with whom the attorney has had no contact, the risks inherent in third-party fee payments are obvious.

> For an agent to accept money from a third party without the principal's consent in the matter for which the agent is employed may be a breach of the agent's fiduciary duty to the principal, because the money may be an inducement to serve the third party's rather than the principal's interests. A client who employs a lawyer to litigate against a third party has a legitimate interest in having his lawyer refrain from taking the third party's money in exchange for throwing the fight.

Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1327 (9th Cir. 1999) (footnote omitted). However, once the risk that third-party payment will adversely affect representation becomes a reality, the attorney cannot represent the client under any circumstances.

It does not matter whether Class Counsel *believed* he could still fairly and adequately represent the plaintiff class.[12] The first and most basic requirement of Rules 4-1.7(b) and

[12] By questioning the adequacy of Class Counsel in this case, Relators are not questioning Class Counsel's good faith, honesty, or fitness to be a member of the Bar.

4-1.8(f) is whether a *reasonable* attorney would have concluded — as Class Counsel did here — that accepting money from potential defendants would not adversely affect his representation of the plaintiff class. However, Class Counsel accepted that money with the understanding that he would not even consider claims the plaintiff class might have against the brokers or Underwriter for the exact same injury asserted by Class Counsel against other Defendants. Moreover, Class Counsel could not even advise his clients about the nature and merits of claims against those potential defendants based upon facts they admitted during Class Counsel's investigation. Given the limitations the brokers' and Underwriter's payments placed on Class Counsel, no reasonable attorney could believe that his or her representation would not be adversely affected. *See* Mo.S.Ct.R. 4-1.7 (comment) (loyalty *is impaired* when "lawyer cannot consider, recommend or carryout" otherwise available alternatives).

From the very beginning, potential defendants directed Class Counsel's investigation. When Greiman was first hired by the brokers to intervene in the equity case, the brokers directed him to oppose the sale of the collateral. In addition to that specific goal, Greiman was also going to "take reasonable steps to investigate and evaluate potential claims against third parties . . . ." Even though Greiman represented six specific bondholders at that time, and although he had no express agreement with the brokers, he thought it was

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The application of Rule 4-1.8(f) to Rule 52.08(a)(4) does not require the court to evaluate Class Counsel's subjective intent; rather, the issue is whether Class Counsel's decisions were reasonable.

implicit in his relationship with the brokers that he could not even consider claims against the brokers because they had hired him and were defining the scope of his representation.

As Class Counsel became even more involved with the brokers and Underwriter, these potential defendants dictated counsel's decisions concerning his representation of the class even to the point of providing counsel with the list of potential plaintiffs to use as the class representatives. Most importantly, Underwriter and the brokers interfered with Class Counsel's independent professional judgment and the client-lawyer relationship between counsel, named plaintiffs, and the class members, by foreclosing any consideration of class claims against Underwriter and Underwriter's counsel.

In his July 1999 engagement letter, Class Counsel acknowledged that there are unspecified "potential claims" against Underwriter and the brokers. Under plaintiffs' theory of the case, Underwriter and Underwriter's counsel admitted facts establishing their liability to at least those members of the class who bought bonds after July 15, 1995. That is when Underwriter's counsel supposedly discovered that SLC had misappropriated bond proceeds, thereby causing the bonds to default according to plaintiffs. Yet Underwriter's counsel and Underwriter continued to effect the issuance and sale of an additional $9 million in bonds after that date.

However, under the terms of the deal for Class Counsel's fees, the brokers and Underwriter will recover the money they have paid to Class Counsel if there is a recovery for the class. In which case, the brokers and Underwriter would recoup their contribution to the $120,000 retainer before the absent class members get a nickel. In effect, the brokers and Underwriter have become stakeholders in the plaintiffs' case. Thus, if the absent class members were to sue Underwriter, whether in the same or a separate action, Underwriter would for all practical purposes be operating on both sides of the litigation.

As Class Counsel wrote in his July 1999 engagement letter, because of "the funding they have contributed," Class Counsel is not "in a position to consider or pursue" any of these "potential claims." It is difficult to imagine a clearer conflict of interest. Class Counsel admitted that its decision not to pursue potential claims against Underwriter was not based upon its independent professional judgment of the merits of those claims, because Class Counsel did not even evaluate the merits of those claims. (*See, e.g.,* Ex. 5, Greiman Dep. (10/26/00) at 40.) Class Counsel's deal with the brokers and Underwriter prevented Class Counsel from even "considering" these claims.

Class Counsel, by claiming that such limitations on his ability to represent the class are excused for tactical or strategic reasons, only reinforces the influence the brokers and Underwriter have had on Class Counsel's decisionmaking throughout. Of Class Counsel's several proffered excuses, none withstand scrutiny.

First, Class Counsel has repeatedly argued that plaintiffs did not sue either Underwriter or the brokers because there were arbitration agreements between them and the class members. Class Counsel also argued that these supposed arbitration agreements would preclude a class action because some of the class members would be required to arbitrate their class claims. (Ex. 32 at 121.) However, this argument is without merit because (1) Greiman never saw any arbitration agreements, (2) his assumption that there were agreements is unfounded, and (3) the National Association of Securities Dealers

("NASD") and the New York Stock Exchange ("NYSE") rules of arbitration prohibit arbitration of class claims.

Greiman merely assumed that many of the class members had arbitration agreements with Underwriter because some customers in unrelated matters asserted arbitration claims against Underwriter. (Ex. 32 at 123.) Class Counsel admitted that he never saw nor investigated the existence of any such arbitration agreements (Ex. 21, Greiman Dep. II at 29-30; Ex. 32 at 111). Such an assumption ignores the fact that the Rules of Arbitration of the National Association of Securities Dealers ("NASD")[13] and the New York Stock Exchange ("NYSE")[14] require member brokers to submit claims to arbitration at the instance of their customers, *even if there is no arbitration agreement* with the customer. *See* NASD Code of Arbitration Procedure Rule 10301(a); *see also* NYSE Arbitration Rule 600(a).

Therefore, an arbitration claim by a customer against Liss does not mean there are arbitration agreements. As an NASD member, Liss is required to arbitrate claims if the customer wants an arbitration, even when there is no arbitration agreement. Greiman also conceded that even if arbitration agreements did exist between bondholders and brokers

[13] The Code of Arbitration Procedure for the NASD may be found at www.nasdadr.com and the CCH NASD Manual.

[14] The NYSE Arbitration Rules may be found at www.nyse.com/pdfs/Rules.pdf and Vol. 2 CCH New York Stock Exchange Guide.

other than Liss, those agreements would not control claims by bondholders against Liss, the bond underwriter. (Ex. 21, Greiman Dep. II at 30-31.)

More importantly, even if the plaintiffs had individual arbitration agreements with Underwriter, the rules of arbitration of the NASD and the NYSE specifically prohibit the arbitration of any claim filed by a member of a putative or certified class action if the claim is encompassed by a putative or certified class action filed in a state or federal court. *See* NASD Code of Arbitration Procedure Rule 10301(d); *see also* NYSE Arbitration Rule 600(d).

Another excuse Class Counsel asserted for agreeing not to sue the brokers or Underwriter was the need for "inside" information that only Underwriter and the brokers could provide. Class Counsel has argued that this need left him with no choice but to enter into an alliance with the brokers and Underwriter. This argument simply ignores the facts. Class Counsel was not able to make a "strategic decision" to ignore potential class claims in order to obtain information from potential class defendants because the initial $20,000 retainer Greiman accepted prevented Class Counsel from considering any of those claims "from the get go." Greiman freely admitted that he was unable to consider any potential claims against the brokers who initially hired him with the first $20,000 retainer. Liss was part of the consortium of brokers who paid him; therefore, Liss was one of the parties Class Counsel could not even consider suing. Later, when Class Counsel was "investigating" potential class claims, the decision not to investigate or consider claims against Underwriter (Liss) was not based upon information that may or may not be available from Underwriter, because the decision had already been made when Class Counsel first accepted money from Liss and the other brokers that Class Counsel would not pursue any claims against Underwriter.

Even if Class Counsel had not compromised his ability to independently evaluate claims against Underwriter when he accepted payment of that initial retainer, 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. Greiman identified three pieces of "inside information" that supposedly necessitated entering into the agreement: (1) the information from Underwriter's counsel concerning the Bank's alleged knowledge of defaults; (2) the information that certain ALCT funds of approximately $800,000 "disappeared" between December 1995 and March 1996; and (3) the information about the way in which Marshall & Stevens' conducted appraisals of the leased property. (*See, e.g.,* Ex. 34 at 18-19.) Class Counsel admitted that he knew everything about each of these claims well *before* the December 1998 meeting at which the agreement not to sue was for the first time expressly made.

- Greiman testified that he talked to Underwriter's counsel in the fall of 1998. (Ex. 33 at 165-166.) At that time, Underwriter's counsel laid out the whole story concerning his alleged suspicions that certain entries on ALCT's Form 10-Q may have shown that money was being diverted to SLC, his telephone conversation with a Bank employee about those concerns, and his later telephone call with Doster on the same subject. (Ex. 33 at 165-166.)
- Class Counsel learned about the $887,000 of equity that allegedly disappeared in early 1996 when he reviewed the 10-Ks. (Ex. 33 at 175-176.) This

information became the basis for Counts XI and XII. Greiman had the 10-Ks before the December 18, 1998 meeting. (Ex. 21, Greiman Dep. II at 17.) Greiman also obtained the information about the "disappearance" of ALCT funds from SLC's former Chief Financial Officer, with whom Class Counsel met at some unspecified time before the filing of the lawsuit, probably before the December 1998 meeting. (Ex. 32 at 116-117.) During those meetings, SLC's former Chief Financial Officer apparently espoused the theory that approximately $800,000 "disappeared" from ALCT's accounts between December 1995 and March 1996. Class Counsel did not need to give away the opportunity to sue Underwriter for this information, because it did not come from Underwriter or even from one of Underwriter's agents.

- Similarly, Class Counsel already had the information concerning Marshall & Stevens appraisals in the fall of 1998 from the brokers. (Ex. 32 at 115; Ex. 33 at 173.) None of this information came from Underwriter or Underwriter's agents; therefore, there is no justification for giving up the opportunity to sue Underwriter in order to obtain this so-called "inside information."

Several times during his testimony, Class Counsel suggested that the Code of Professional Responsibility or just common decency somehow prevented using information gained from Underwriter to sue Underwriter.[15] (*See*, *e.g.*, Ex. 32 at 114.) If

[15] Class Counsel's position only makes sense if the brokers and the Underwriter were clients or former clients (which counsel adamantly denies). The Rules prohibit a lawyer

this were the case, it merely establishes that Class Counsel's ability to fairly and adequately represent the class with undivided loyalty is compromised by some competing duty to third parties — a traditional conflict of interest. Assuming counsel properly identified themselves as lawyers seeking to represent a potential class of bondholders (which they undoubtedly did) there is no moral or ethical reason why they should not use admissions by the brokers, Underwriter, Underwriter's counsel, or anyone else against them. Indeed, counsel's notion of an "implicit" understanding not to sue anyone who talks to a lawyer about the facts of the case would, if adopted as a rule of law, severely limit any pre-trial investigation.

The result would be a repetition of the absurdity we have here: an attorney learns information from a third party that (under the attorney's theory) is an admission that the third party committed acts that make it liable to his or her clients for at least $9 million — a liability that presumably could have been established through summary judgment. Then the attorney refuses to sue the third party because they were the source of the information. This is comparable to a prosecutor refusing to prosecute because the defendant confessed.

Class Counsel's other attempts to justify their deal are equally unsupportable. *See supra* Statement of Facts, Section III.

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from using confidential or other information obtained from a client to the disadvantage of the client, *see, e.g.* Rules 4-1.6(a), 4-1.8(f), but there is no such prohibition from using information gained from a non-client to further a client's interest.

The further absurdity of Class Counsel's position is illustrated by their concept of the scope of their representation. Even though Class Counsel gave the named plaintiffs a copy of a Wisconsin complaint against Liss that was unrelated to the bonds in this case, he felt no responsibility to tell his clients in the letters (or at any other time) that he had information showing that Underwriter and Underwriter's counsel participated in the issuance of $9 million in bonds after the bond issue was in default. (Ex. 33 at 223.) The ostensible reason for concealing this information from the named plaintiffs was that it went "beyond the scope" of what Class Counsel undertook. (*See, e.g.,* Ex. 34 at 25, 28-29; Ex. 34 at 9, 46.) This scope was determined by the brokers and Underwriter.

Moreover, assuming Underwriter or the other brokers had any information not already possessed by Class Counsel, plaintiffs did not explain why they could not have obtained this information by way of subpoenas or other routine discovery procedures. In short, counsel had no basis for a reasonable belief that the deal with the brokers in any way served the class's interests. There was no reason to strike the deal for additional "inside" information because counsel already had what they needed to file suit.

2. Class Counsel Violated The Rules Of Professional Conduct By Failing To Safeguard Privileged And Confidential Information Of Their Clients In That Counsel Agreed To Share Such Information With Potentially Adverse Parties.

As noted above, Rule 4-1.8(f) provides in part: "A lawyer shall not accept compensation for representing a client from one other than the client unless . . .

information relating to representation of a client is protected as required by Rule 1.6." Class Counsel cannot fairly and adequately represent the interests of the class members because Class Counsel has not taken steps under Missouri Supreme Court Rule of Rule 4-1.6 to protect privileged and confidential information from disclosure to potential class defendants. To the contrary, they may have already waived any attorney-client privilege the class members might have been able to assert.

The engagement letters state that "it may be necessary to share privileged or otherwise confidential information with them." (Ex. 18.) By further assuming that the named plaintiffs approved of this sharing by their silence or non-responsiveness, Class Counsel eliminated any expectation the plaintiffs might have had that communications between plaintiffs and their attorneys would be kept confidential. Without that expectation there is no attorney client privilege. *See, e.g., State v. Shire*, 850 S.W.2d 923, 931-32 (Mo. App. 1993) (attorney-client communication in presence of third-party who is not confidential agent of either attorney or client is unprotected).

Even if the privilege remains, Class Counsel have taken no affirmative steps to protect his clients' confidentiality from the clients' adversaries. Even though Class Counsel was unsure whether he had already shared privileged or confidential information with Underwriter, and despite Class Counsel's claims that his clients could sue Underwriter and other potential defendants by hiring different lawyers, he certainly felt free to share such information with them in the future. (Ex. 5, Greiman Dep. 18-20, 43-8, 47-48, 78-79.) In other words, Class Counsel committed to share privileged and confidential information with the very persons his clients might sue.

3. Class Counsel Violated The Rules Of Professional Conduct By Failing To Obtain The Clients' Informed Consent To Counsel's Agreement With Potential Defendants, In That Counsel Never Consulted With Any Clients Before Reaching An Agreement Not To Sue Potential Defendants, And Never Adequately Disclosed The Nature, Advantages, And Disadvantages Of That Agreement To The Named Plaintiffs, Much Less The Absent Class Members They Purport To Represent.

The safeguard against a potential conflict of interest is the requirement for client consent. This consent safeguard gives the client the opportunity to determine for itself whether the lawyer is serving the client's best interests. *Nixon*, 34 S.W.3d at 135 (when defendant pays plaintiff's attorneys' fees, client must be informed of fee arrangement, client must consent to arrangement, and arrangement must not compromise lawyers' duty of loyalty to client). Class Counsel cannot fairly and adequately represent the class members because Class Counsel did not fully explain the conflict of interest and obtain the required consent of the named plaintiffs after appropriate consultation with them. Even if Class Counsel mistakenly thought its divided loyalties would not adversely affect its representation of the class members, Class Counsel failed to provide the class members with sufficient information for them to decide on their own. The requirement of client consent after consultation in Rules 4-1.7(b) and 4-1.8(f) means that an attorney must *fully* disclose to the client *all* pertinent facts that might affect the client's decision whether to give his or her consent. *See In re Schaeffer*, 824 S.W.2d 1, 3 (Mo. banc 1992).

Full disclosure requires that a client have "reasonably adequate information about the material risks" of the representation, and an adequate understanding of the "nature and severity of the lawyer's conflict." *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 122(1) & comment (2000).

In other words, Class Counsel was required to make full disclosure to their clients of what they had done, why they did it, and the risks and potential benefits of the financial arrangement with potential adversaries. Class Counsel did not personally consult with the named plaintiffs. The engagement letters and their follow-up — the only mode by which the firm communicated with most of the named plaintiffs until just before depositions were taken in 2000 and 2001 (more than a year after the lawsuit was filed) —are deficient in several respects. The undisputed facts show that Class Counsel withheld critical information from the named plaintiffs (not to mention the absent members of the class they seek to represent) and provided them with irrelevant information that was potentially misleading.

The July 6 engagement letter failed to disclose:

1. The names of the brokers who contributed to the retainer (Exs. 18 & 33 at 185);
2. That Underwriter contributed to the retainer (Exs. 18 & 33 at 186);
3. How much Underwriter and each of the brokers contributed to the retainer (Exs. 18 & 33 at 186);
4. Why plaintiffs would share privileged and confidential information with the brokers or Underwriter (Exs. 18 & 33 at 186-7);

5. The consequences of sharing privileged and confidential information with the brokers or Underwriter (Exs. 18 & 33 at 186-7);
6. A description of the potential claims against the brokers that Class Counsel cannot pursue (Exs. 18 & 33 at 187-88);
7. A description of the potential claims against Underwriter that Class Counsel cannot pursue (Exs. 18 & 34 at 43-44);
8. That Underwriter and Underwriter's counsel knew in July, 1995 that there was an alleged event of default on the bonds but they continued to market and sell the bonds (Exs. 18 & 33 at 188);
9. The possibility that individual claims might be the subject of arbitration agreements (Exs. 18 & 33 at 188);
10. That there are a statutes of limitations on potential claims Class Counsel would not pursue (Exs. 18, 33 at 189, & 34 at 44);
11. Whether the bondholders should seek independent counsel (Exs. 18 & 34 at 41-42); and,
12. The advantages or disadvantages to the bondholders of pursuing their claims as a class action (Ex. 18).

Although the October 6 letter was somewhat more specific than the July 6 letter, it too was deficient. It said: "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." (Ex. 19.) However, the October 6 letter still did not explain that J.E. Liss and Company, Inc. was Underwriter as well as the broker or that Underwriter and Underwriter's counsel, despite knowing about an alleged event of default on the bonds in July 1995 continued to market and sell bonds. The letter was also misleading while it reported that Class Counsel could not pursue claims against Liss, it informed the class representatives that a "class action" had been filed against Liss in Wisconsin, and attached the complaint in that case. (Ex. 19.) However, the letter never explained that, even though the Wisconsin class action concerned SLC, the claims in that case involved different securities than the claims in this case. Thus, Class Counsel left the false impression that the agreement he had with Liss would not prejudice the named plaintiffs because there was another class action lawsuit against Liss brought by other lawyers that would protect their interests *vis-à -vis* Liss.

Truly informed consent in this case would have required Class Counsel to describe the deal he made and what he did, to explain the pros and cons of the deal, and to answer any questions plaintiffs may have had. But counsel never did this. Instead, they sent terse letters asking the bondholders to consent to the already consummated agreement not to sue certain unnamed persons on a "take-it-or-leave-it" basis without providing an inkling of what the possible claims against those persons might be, what information or other assistance justified not suing them, why counsel might need to disclose confidential and privileged information to the unidentified contributors in order to obtain their assistance, what kinds of confidential and privileged information might be disclosed, or why it was necessary to forgo potential claims against the unidentified contributors in order to obtain information from them.

Class Counsel withheld important information. In the first letter to the named plaintiffs, Class Counsel did not tell his clients that one of the unidentified contributors funding the case was also Underwriter. In *both* letters to the named plaintiffs, Class Counsel withheld the fact that Underwriter knew by July 1995 of facts suggesting the bonds were in default and nevertheless continued to participate in the issuance, marketing and sale of the bonds because he did not believe lawyers have an "affirmative obligation to go out and aid the interest of people in that situation." (Ex. 34 at 46.) Throughout, Class Counsel never advised the named plaintiffs that the statutes of limitations on any claims the bondholders may have had against Underwriter and the brokers would continue to run because of the deal they were being asked to approve. Class Counsel testified that he did not provide that advice.

Class Counsel contended that named bondholders must have known as a matter of "common sense" that Underwriter and brokers would not be sued because they paid the money to fund the litigation. The client's intuition does not substitute for a lawyer's duty to make appropriate disclosures. A client has the right to a lawyer's loyalty and "independent professional judgment." Mo. S. Ct. R. 4-1.7 (comment). Therefore, conflict of interests rules are not purely "technical" or "hypothetical," or have "no real-world significance," as plaintiffs suggested below. Rather, rules prohibiting conflicts of interest are designed to eliminate *risks* of harm before harm occurs, including "foreclose[d] alternatives that would otherwise be available to the client," and a lawyer's "inability to *consider,* recommend or carry out" an appropriate course of action for the client." Rule 4-1.7 (comment) (emphasis added).

Regardless, by the time Class Counsel submitted his engagement letter to the named plaintiffs for "consent," it was too late. Class Counsel's duty of loyalty had already been compromised because potential defendants had already paid him for work he had already done. At that point, Class Counsel had a financial interest in obtaining the named plaintiffs' consent to his agreement with the brokers and Underwriter. Instead of providing the named plaintiffs with independent advise regarding his deal, Class Counsel was an advocate for his deal.

> At the point where the lawyers agree on a settlement, there is tension in the lawyer's role. Whether class action or not, the lawyer who has worked out a settlement with opposing counsel now becomes an advocate for "the deal" as well as an advocate for the client's interests. In class actions, this ethical tension may be particularly acute .. . . Thus, Rule 52.08(e) gives the trial court a role in protecting the interests of the members of the class.

American Family, 106 S.W.3d at 492 (Wolff, J. concurring).

This is precisely what occurred in this case. Apart from superficial consideration of whether suing Underwriter or the brokers would have been a wise tactical decision, counsel ***could not*** and ***did not*** "consider" the possible claims against the brokers and Underwriter because the money paid to Class Counsel foreclosed any such action. (*See* Exs. 18 and 19.) While it may sound harsh, Class Counsel was bought off because the money blinded him. The bondholders also lost their right to have their confidential information protected from Underwriter and the brokers because its confidentiality has already been waived by the agreement with Underwriter and brokers. It is difficult to imagine clearer evidence of harm.

Disclosure is necessary but not sufficient when, as in this case, the lawyer puts himself in a position that interferes with his “wholehearted duty to his client” by accepting or bargaining for any compensation from the other side. *Cf. Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1327 (9th Cir. 1999) (explaining that rationale for ethical prohibitions is based in agency theory) (footnote and quoted authority omitted). In short, Class Counsel’s loyalty to the class has been irreparably compromised. They have failed in their fiduciary duty to protect the interests of the absent class members.

Even if Class Counsel’s conflict of interest were the sort of conflict to which his clients could consent, even if Class Counsel had adequately informed the named plaintiffs about his deal with the brokers and Underwriter, and even if the named plaintiffs validly consented to Class Counsel’s conflict on their own behalf, the named plaintiffs cannot consent to a conflict of interest on behalf of absent class members. Only the court can consent to a potential conflict of interest on behalf of absent class members. *See* Mo.S.Ct.R. 4-1.7 (comment). The Circuit Court failed in that responsibility.

Moreover, this situation is more like a settlement, in that Class Counsel agreed to compromise certain claims in exchange for payment of attorneys’ fees. Named plaintiffs certainly cannot bind absent class members to a settlement. Only the court can do that. The Circuit Court failed in that responsibility as well.

II. Relators Are Entitled To An Order Making This Court's Preliminary Writ Absolute And Prohibiting Respondent From Enforcing His Order Granting Class Certification, Because The Class Representatives Cannot Fairly And Adequately Represent The Absent Class Members, In That The Named Plaintiffs Were Chosen By Potential Defendants; Class Counsel Has An Incurable Conflict Of Interest And Is Controlling The Litigation; And, By Agreeing To The Deal Class Counsel Struck With Potential Defendants, The Named Plaintiffs Tainted Themselves With The Same Conflict Of Interest.

In addition to Class Counsel who struck the deal ignoring certain class claims in exchange for money, the named plaintiffs who approved this arrangement (uninformed of all relevant facts and in the dark) should be ruled inadequate for purposes of Rule 52.08. The named plaintiffs are inadequate representatives for the absent members of the class because they condoned and approved the Class Counsel's agreement not to sue Underwriter in exchange for a payment of $60,000 and to reimburse Underwriter — a culpable party according to the information Greiman himself obtained — before any member of the class is paid.

One of the primary responsibilities of the named class plaintiffs is to protect the interests of the class against the possibly competing interests of the attorneys and monitor any conflict of interest of class counsel, especially in those instances where class counsel may have a greater concern for receiving a fee than for pursuing class claims. *Vermont*, 826 A.2d at 1012. In this case, the named plaintiffs did not even raise questions regarding the potential class claims that Class Counsel indicated it would not pursue and completely abandoned any responsibility for protecting the interests of the class. The adequacy of representation requirement is intended to prevent situations where named plaintiffs simply lend their names to a suit controlled wholly by class counsel. *Id.* That appears to be precisely what has occurred here.

In a class action, the named plaintiffs are supposed to represent the interests of the absent class members. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983) ("Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims"). In order for the named plaintiffs to fairly and adequately represent the absent class members, those interests must coincide. No absent class member can be expected to have confidence in the representation provided by the named plaintiffs because they were chosen by potential defendants.

For purposes of determining the adequacy of class representatives, "the performance of the class lawyer is inseparable from that of the class representative." *Culver*, 277 F.3d at 913. "[R]ealistically, functionally, practically" the class counsel ***is*** the class representative. *Id.* "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry." *Greenfield*, 483 F.2d at 832 n. 9.

The named plaintiffs suffer under the same conflict of interest as Class Counsel, because the named plaintiffs agreed to the deal Class Counsel struck with potential defendants. Ordinarily, part of the adequacy inquiry involves a determination of whether the named plaintiffs, as proposed class representatives, have the financial wherewithal to adequately pursue the class claims. *See, e.g., American Family*, 106 S.W.3d at 491 & n. 6 (Wolff, J. concurring) ("the plaintiff class representatives must bear the cost of notice" (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974))). In this case, the named plaintiffs must fail such an inquiry, not because they (combined with their attorneys) cannot adequately fund the litigation on behalf of the class, but because the named plaintiffs agreed to limit what claims they would assert on behalf of the class in order to finance the class action without any personal financial risk. *Cf. Zucker*, 192 F.3d at 1327 ("risk of collusion may be especially high if defendants can buy off the attorneys with money from [someone else] and avoid spending their own money") (footnotes omitted).

III. Relators Are Entitled To An Order Making This Court's Preliminary Writ Absolute And Prohibiting Respondent From Enforcing His Order Granting Class Certification, Because He Allowed This Lawsuit To Proceed As A Class Action With Representation So Inadequate That Any Judgment Would Be Void, In That Respondent Failed To Finally Decide Whether Class Counsel's Ability To Adequately Represent Absent Class Members Was Limited By The Obvious Conflict Of Interest Class Counsel Created When He Agreed Not To Sue Potential Defendants In Exchange For Assistance In Financing The Litigation And Soliciting The Class Representatives, And Respondent Required Absent Class Members To Decide For Themselves Whether Counsel's Conflict And Inability To Pursue All Potential Class Claims Left Counsel Unfit To Represent Their Interests.

A court's duty to oversee class actions is well established. "The ultimate responsibility" for compliance with the procedural rules governing class actions "is committed to the [trial] court in whom, as the guardian of the rights of the absentees, is vested broad administrative, as well as adjudicative, power." *Greenfield*, 483 F.2d at 832. Under 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. *See, e.g. American Family*, 106 S.W.3d at 495 n.11 (Wolff, J., concurring). "[T]he court should use its broad administrative, as well as adjudicative power as guardian of the rights of the absentees to see that the absentees are represented by counsel who is ethically as well as intellectually competent to represent them." *Stavrides*, 60 F.R.D. at 637 (internal quotes, footnotes and quoted case omitted).

In this case, Respondent had a duty to examine counsel's relationship with potential class defendants and the agreement with those potential defendants that counsel entered into on behalf of the class with the utmost scrutiny. *See, e.g, City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53, 59 (Mo. App., W.D. 2000) (notice does not substitute for circuit court's obligation to determine adequacy of class representation).

The "deal" between counsel and Underwriter and the brokers, and the named plaintiffs' approval of it, was an unacceptable forfeiture of the class members' rights and may have permanently damaged their ability to recover from culpable parties. In light of Class Counsel's unique fiduciary obligations to absent class members, it is imperative that a court evaluate counsel's adequacy with particular care. *See Stavrides*, 60 F.R.D. at 637. In certifying a class, the *court*— not the named plaintiffs — chooses the class members' lawyer. *See, e.g., Byrd v. Chadwick*, 956 S.W.2d 369, 383 (Mo. App. 1997) ("[T]he trial court should have reviewed whether it appeared that class counsel was adequate, that the named plaintiffs were adequate representatives of the class, that there is no apparent conflict of interest between the representatives and the class or among the class . . . .")."Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure." Mo. S. Ct. R. 4-1.8(f) (comment). That is not what happened in this case.

To the extent the Circuit Court decided to allow this matter to proceed as a class action because he thought failing to certify a class after such a long delay would result in absent class members claims being barred by the statute of limitations, the Circuit Court was wrong. *Crown, Cork & Seal*, 462 U.S. at 354 (statute of limitations remains tolled for all members of putative class action until certification is denied, when class members may file their own suits or seek to intervene); *Eisen*, 417 U.S. at 176 n. 13 (class member's right to opt out and press separate claim remains meaningful because filing of class action tolls statute of limitations); *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 554 (1974) (commencement of class action suspends applicable statute of limitations as to all asserted members of class who would have been parties had suit been permitted to continue as class action).

"In a class action, substantial justice may require the court to do more than encourage settlement. The absence of individual clients controlling the litigation for their own benefit creates opportunities for collusive arrangements in which defendants can pay the attorneys for the plaintiff class enough money to induce them to settle the class action for too little benefit to the class (or too much benefit to the attorneys, if the claim is weak but the risks to the defendants high)." *Zucker*, 192 F.3d at 1327 (footnotes omitted).

The Circuit Court's plan to allow potential class members to opt out does not solve the problem created by Class Counsel's conflict of interest. First, it does not ask the class members to waive the conflict of interest. Rather than seeking to obtain class members' informed consent to the representation, the circuit court would condition the absent class members ability to participate in the class action upon their willingness to waive the conflict. Class members should not be forced to make that coerced choice. Second, even if the Circuit Court's notice-and-opt-out-plan did seek to obtain a voluntary waiver of Class Counsel's conflict, such a plan does not protect all absent class members, because class action notice rarely reaches all class members. *See, e.g., American Family*, 106 S.W.3d at 491 & n. 6 (Wolff, J. concurring) ("the best possible notice by publication will fail to reach a number of class members," and "even individual notice by mail usually does not deliver actual notice to the entire class").

Rather than supervising a procedure for obtaining consent from the class members *before* allowing Greiman to represent the class, the Circuit Court appears to have presumed class members would consent by relying on Rule 52.08(c)(2)'s opt-out provisions which, by default, would allow Greiman to represent absent class members unless they revoke their "presumed" consent by withdrawing from the class action.[16] Except as otherwise ordered by the court, every potential member of a class is considered to be a member unless he affirmatively seeks exclusion. *See* Mo. S. Ct. R. 52.08(c)(3); *see also* Fed. R. Civ. Proc. 23(c)(3).

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[16] It is worth noting that, the Circuit Court's Order does not require the notice to class members to include, and Class Counsel's proposed notice to class members does not include, the clear requirement of Missouri Supreme Court Rule 52.08(c)(2)(C) advising that "any member who does not request exclusion may, if desired, enter an appearance through counsel." (*See* Exs. E-F.) In fact, the proposed notice states that anyone who remains a class member will be represented by the current Class Counsel. (Ex. F at 5.)

Whether, by violating the Rules of Professional Conduct, Greiman should be disqualified from representing the named plaintiffs if they wish to bring individual claims is a different issue that is not relevant to whether he may represent absent class members. Only in a class action is the court charged with the affirmative duty to ensure that the absent plaintiffs are fairly and adequately represented. Class certification presents larger issues than the named plaintiffs' right to select who will represent *them.* "Unidentified class members cannot waive a potential conflict of interest." *Palumbo v. Tele-Communications*, 157 F.R.D. 129, 132-33 (D. D.C. 1994) ("the Court has an obligation to closely scrutinize the qualifications of counsel to assure that all interests, including those of as yet unnamed plaintiffs are adequately represented"). Class Counsel owes a fiduciary duty to the absent class members. Therefore, the issue is whether counsel's conduct establishes that it cannot fulfill its fiduciary duties to the *absent members of the class*, not whether counsel can represent the named plaintiffs in an individual action.

The Circuit Court had a responsibility to absent class members to decide whether Class Counsel had a conflict of interest that made them and the named plaintiffs inadequate class representatives. However, rather than exercising its oversight responsibility on behalf of the absent class members, the Circuit Court decided to have the absent class members decide for themselves (by default by not opting out) whether Class Counsel had a disqualifying conflict. The question of adequate representation is "often labeled the most important of due process requirements." *Vermont*, 826 A.2d at 1012.

The trial court's responsibility to decide the adequacy of class counsel cannot be shifted to the class members themselves, particularly where, as here, the Circuit Court's understanding of the issues was acquired over three days of lengthy hearings and by reviewing two depositions of counsel, the depositions of eight named plaintiffs, many exhibits, and hundreds of pages of briefs. Lay bondholders simply cannot be expected to assess the evidence — even if all of it were made available — to arrive at a determination of whether the lawyers acted in their best interests by accepting payments from Underwriter who sold them bonds (allegedly *already* in default) in exchange for an agreement to let Underwriter and its "affiliates" off the hook in this case. To require them to consult their own attorneys for professional advice as to the conflict of interest issue, even assuming they could recognize one on their own, would defeat the purpose of a class action. *See, e.g.*, *Vermont*, 826 A.2d at 1009.

IV. Relators Are Entitled To An Order Making This Court's Preliminary Writ Absolute And Prohibiting Respondent From Enforcing His Order Granting Class Certification, Because Class Counsel's Unwritten Deal With Potential Class Defendants Abuses The Class Action Process Violating The Due Process Justification For Class Actions, In That It Creates A *De Facto* Settlement Class Exempt From Judicial Oversight.

"[A] class action, so instinct with benefits, is also wrought with mischievous effects . . . ." *Greenfield*, 483 F.2d at 831 (internal quotes and quoted case omitted). Courts have recognized that class actions possess certain characteristics that lead to its "abuse through solicitation and maintenance." *Stavrides*, 60 F.R.D. at 637 n. 6. "To avoid abuse of the [class action] procedure, trial courts should pay close attention to the rights of the unnamed members of the class . . . ." *American Family*, 106 S.W.3d at 496 (Wolff, J. concurring). Indeed, Rule 52.08(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." *American Family*, 106 S.W.3d at 492 n. 9.

In many cases "the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion" *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). However, in this case, Class Counsel would have the class split their causes of action, proceeding against some of the defendants in this case and other defendants in an entirely different action. Such an approach does not further the interests of efficiency and economy that the class action procedure is designed to promote.

The fair and adequate representation required by due process means that the representative in a class action must "be free of any interest which hold the potential of influencing his conduct of the litigation in a manner inconsistent with the interests of the class." *Davis,* 619 F.2d at 593 (internal quotes and quoted case omitted). A plaintiff does not fairly and adequately represent a class when he is not the driving force behind the litigation, when the action is in fact controlled by others with antagonistic economic interests. *Cf. Id.*, at 593-94, 596 (discussing fair and adequate representation in context of shareholder derivative classes).

Not only does Class Counsel's conflict of interest prevent Class Counsel from fairly and adequately representing the class members, it has allowed Underwriter and Class Counsel to abuse the class action process. It is apparent that someone other than the named plaintiff is actually in control of the litigation when the named plaintiff follows the other parties lead in important areas such as selection of counsel, when the other party serves as a liaison between counsel and class members, and when the other party is the source of counsel's information for the complaint. *See Id.*, at 596 (citing *Nolen v. Shaw-Walker Co.*, 449 F.2d 506, 509-510 (6th Cir. 1971)).

By turning a blind eye to the plaintiffs' potential claims against Underwriter and Underwriter's counsel, Class Counsel has allowed the statutes of limitations to run on those claims unheeded. By now, the class members may have lost some or all of their claims against Underwriter and brokers to the statutes of limitations.

Therefore, to the extent the brokers and Underwriter were able to divert class attention from their own culpability by financing and directing Class Counsel to pursue claims against all other potential defendants, the brokers and Underwriter were able to free themselves from potential liability. In essence, by using Class Counsel and the named plaintiffs as their pawns, the brokers and Underwriter were able to turn this case into a *de facto* settlement class action exempt from judicial oversight. In exchange for a $120,000 deposit, the brokers and Underwriter were able to effect a release from potential class claims on which the statutes of limitations may have now run. "Whether the proposed compromise is submitted to the court before or after class action status has been obtained, the court is obliged to determine whether the settlement has been influenced by fraud or collusion and whether it is fair, adequate and reasonable." *Greenfield*, 483 F.2d at 833 (footnote omitted).

By accepting attorneys' fees in exchange for an agreement not to sue, Class Counsel has, *de facto*, effected a settlement with Underwriter and the brokers without the examination or approval of the court. Class Counsel should have never accepted payment of fees from potential class defendants until after the court had thoroughly reviewed the situation and then approved the settlement on behalf of the absent class members.

CONCLUSION

For the reasons set forth above, Relators respectfully request this Court make its preliminary writ absolute, prohibit Respondent from enforcing his order granting class certification, and grant such other and such other and further relief as this Court deems just under the circumstances of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I caused a copy of the foregoing and a copy of the disk required by Rule 84.06(g) to be served upon each of the parties by first-class, U.S. mail, postage prepaid, this 9th day of January, 2004, as indicated below.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I hereby certify that the foregoing Relators' Brief complies with all requirements of Supreme Court Rule 84.06(b) and (g) in that:

1. Relators' Brief (excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix) contains 17,404 words, based upon the word count of the word-processing software used by the undersigned and, therefore, does not exceed the 31,000 words allowed under Rule 84.06(b).
2. Relators' Brief has been formatted and saved on the accompanying diskette in Microsoft Word 97, Version SR-2. The diskette has been scanned for viruses and found to be virus-free by the anti-virus software used by the undersigned.

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APPENDIX

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