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' REPLY BRIEF

Brian R. Plegge, #32500
Carrie Wrisberg, #42814
MOSER AND MARSALEK, P.C.
200 North Broadway, Ste. 700
St. Louis, MO 63102-2730
(314) 421-5364
(314) 421-5640 (fax)

Attorneys for Relator Marshall & Stevens, Inc.

John C. Rasp, #20170
Michael A. Clithero, #31402
Geoffrey Gerber, #47097
BLACKWELL SANDERS PEPER MARTIN LLP
720 Olive Street, 24th Floor
St. Louis, MO 63101
(314) 345-6000
(314) 345-6060 (fax)

Attorneys For Relator Union Planters Bank, N.A

Frank Susman, #19984
Kenneth B. Newman, #39720
Andrew D. Dillon, #32965
GALLOP, JOHNSON & NEUMAN, L.C.
101 South Hanley
St. Louis, MO 63105
(314) 615-6000
(314) 615-6001 (fax)

Attorneys for Relators Michael J. Doster and Doster, James, Hutchinson & Ullom, P.C.

Martin M. Green, #16465
David T. Butsch, #37539
GREEN SCHAAF & JACOBSON, P.C.
7733 Forsyth Boulevard, Ste. 700
St. Louis, MO 63105
(314) 862-6800
(314) 862-1606 (fax)

Attorneys for Relators Robert Chlebowski and Lynne Frownfelter

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

ARGUMENT

This proceeding concerns whether a class can be fairly and adequately represented by attorneys and representatives whose decisions are limited by their relationship with (and money paid by) the class-members' potential defendants. Plaintiffs' omissions and emphasis on irrelevancies demonstrates the error inherent in the decision they attempt to defend. Nowhere in Plaintiffs' Brief is there any discussion of terms under which Plaintiffs' Counsel first purported to investigate the claims in this case when he supposedly represented ***individual*** bondholders.

Respondent misconstrues the purpose of the class certification proceedings by arguing that Relators have not demonstrated that they are not liable for the bondholders' losses.[1] (Plaintiffs' Br. 32, 42-43). The question of liability is not the issue. Plaintiffs' discussion of their allegations has relevance only because the conflict of interest created by the relationship between those claims and the claims that are precluded by the financial dealings between Plaintiff's Counsel and potential defendants renders Plaintiffs' Counsel inadequate.

Whether Plaintiffs' claims have any merit (which Relators maintain they do not and which Relators will continue to challenge) is irrelevant to the current question. The question of whether this case should be certified as a class action and whether the class representatives and class counsel are adequate is the only issue at this stage. One of the cases cited by Plaintiffs, *Kline v. First Western Government Securities*, 1996 WL 153641

[1] In fact, Relators have each filed Answers denying liability.

(E.D. Pa. 1995), states that "On a motion for class certification it is not necessary — nor would it be proper — to resolve factual disputes pertinent to the merits of the case itself." *Id.* at *6 (citations omitted). Furthermore, each of the Relators has denied liability. (Relators' Writ Petition Exs. C-1 through C-4).

The inquiry, properly focused, is whether Plaintiffs' Counsel can fairly and adequately represent an entire class of plaintiffs even though counsel cannot assert the class claims against other potential defendants because of Counsel's financial relationship with those potential defendants. Plaintiffs' Counsel's *post hoc* attempts to rationalize his inability to assert the claims of absent class members against all of the potential defendants as being justified by strategic decisions misses the point. The ability of Plaintiffs' Counsel to exercise his independent professional judgment in making decisions that he now attempts to characterize as "strategic" was compromised.

I. As Defendants In A Class Action, Relators' Own Interests Motivate Their Challenge To The Adequacy Of Class Representation And Protect The Integrity Of The Class Action Process; However, The Interference In Plaintiffs' Case By Potential Defendants Threatens The Integrity Of The Class Action Process And Plaintiffs Have Made No Attempt To Explain Why Potential Defendants Would Solicit Potential Plaintiffs, Hire Plaintiffs' Counsel, Pay A Significant Retainer, And Provide Plaintiffs With Inculpatory Statements On The Basis Of An Implicit Or Oral Agreement If The Potential Defendants Were Not Trying To Influence The Conduct Of The Litigation.

The class action is a procedural mechanism designed to further the efficient adjudication of multiple common claims. However, when, as in this case, the class action fails to provide a reasonable assurance that the aggregate claims will be finally adjudicated in the context of the class action, the class action fails to serve its primary purpose. *Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003). This case presents that issue in two distinct ways. First, when the absent class members are not fairly and adequately represented, due process prevents their claims from being finally adjudicated. *Hansberry v. Lee*, 311 U.S. 32 (1940). Claims resolved in such a class action are subject to collateral attack. Second, by approving counsel already suffering under a conflict of interest, Respondent unnecessarily injected a reason for potential class members to opt-out.

A. The lack of finality created by the risk of collateral attack undermines class action goals of increasing judicial efficiency.

Citing only two cases,[2] Plaintiffs argue that absent class members may not challenge the adequacy of the class representation in collateral proceedings. (Plaintiffs' Br. at 60 n. 11.) Plaintiffs' argument does not accurately represent the law. First, several jurisdictions allow absent class members to collaterally attack the result of a class action when the absent class members were not adequately represented. Second, it is not a justification for failing to comply with Missouri law requiring that the representative parties — including class counsel — will fairly and adequately protect the interests of the class.

As a fundamental precept of due process, a state can obtain personal jurisdiction over out-of-state class members only if there is adequate representation. *See e.g., Vermont v.*

[2] *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999); and *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3rd Cir.), *cert. denied* 513 U.S. 986 (1994). *Grimes* held that federal courts are required to give collateral estoppel effect to prior state court judgments when state courts would do so (*id.* at 1562), and Delaware would conclude that the plaintiffs are collaterally estopped from attacking the adequacy of representation (*id.* at 1563). *Epstein* was also based on Delaware law. 179 F.3d at 647 note 6.

Homeside Lending, Inc., 826 A.2d 997, 1005-1006 (Vt. 2003).[3] The court in *Homeside Lending* recognized a disagreement between the jurisdictions regarding whether adequacy of representation can be raised by collateral attack and provided extensive citations of authority regarding that issue. *See* 826 A.2d at 1016-1017 (collecting citations). *Homeside Lending* indicated that collateral attack would be permitted since adequacy of representation is the quintessence of due process in class actions. *Id*. at 1017.

Further, *Homeside Lending* teaches that even those courts and commentators who would restrict the availability of collateral attack recognize that collateral attack based on inadequate representation is permissible if the opposing party was on notice of facts making that failure apparent. *Id.* at 1017. Obviously, the defendants in this case have raised the question of the adequacy of representation.

Even though some jurisdictions might limit collateral attacks, it is apparent that in other jurisdictions collateral attack is permitted. In each of those jurisdictions, absent class members in this case could raise a collateral attack in other cases based upon inadequate representation. The extensive litigation over adequacy in this case has placed the joined parties on notice. Therefore, if the current Plaintiffs' Counsel and Plaintiff Representatives were allowed to continue representing the absent class members, the judgment could be held void based on inadequate representation. Any resolution of this

[3] 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).

case would not have a *res judicata* binding effect on absent members who could each file separate actions in different jurisdictions allowing such attacks.

B. Relying on class notice to resolve a conflict of interest, instead of ensuring representation free from a conflict of interest at the outset, promotes rather than minimizes the likelihood that class members will opt-out and each institute their own lawsuit, further undermining class action goals of increasing judicial efficiency.

The decision of Plaintiffs' Counsel to limit his ability to advise Plaintiffs in exchange for financial and other assistance from potential defendants created a conflict of interest. Respondent argues that this conflict can be waived. Even if this conclusion were correct (which it is not), Respondent abused his discretion and undermined the purpose of the class action by approving such representation for each plaintiff who "waives" the conflict by failing to opt-out of the class. Plaintiffs' Counsel, the Class Representatives, and Respondent defeated the purpose of the fair-and-adequate-representation inquiry by creating a situation in which each individual plaintiff must independently decide whether Plaintiffs' Counsel's conflict interferes with their representation. Such a situation increases the likelihood that potential class members will opt-out or that dissatisfied, absent class members might raise a subsequent collateral attack to an eventual settlement or judgment.

The issues regarding class certification are crucial to Relators' interests because, if the case were to proceed as a class action, Relators would need certainty that resolving the

case would dispose of the claims of the absent class members. If potential class members were to opt-out and bring individual lawsuits, or if this class action were to have no preclusive effect, Relators (defendants) would be exposed to a substantial risk of incurring multiple liabilities, would be exposed to multiple suits, and could be exposed to inconsistent results.

C. The class action process is not intended to let potential class defendants create additional litigation by using a plaintiff class to further the interests of the potential defendants.

Relators challenge the adequacy of the representation to avoid the specter of multiple, potentially inconsistent judgments that will result when absent class members are not given fair and adequate representation.[4] In this instance, Relators' self-interest is consistent with the interests in judicial integrity, economy, and finality, as well as the purpose underlying the class action procedure. Plaintiffs, on the other hand, have been unwilling or unable to explain why potential defendants would solicit potential plaintiffs, hire Plaintiffs' Counsel, pay a significant retainer, and voluntarily provide plaintiffs with

[4] Relators challenge the adequacy of the representation for the plaintiff class not because Relators want the plaintiffs to have the best representation possible. The issue in this case is not disqualification of counsel in a traditional sense. It does not matter whether the Class Representatives, who were solicited by potential class defendants, are satisfied with Plaintiffs' Counsel. The issue is whether absent class members are fairly and adequately represented.

inculpatory statements on the basis of an implicit or oral agreement if those potential defendants were not trying to influence the conduct of the litigation.

II. Plaintiffs' Current Counsel Cannot Fairly And Adequately Represent The Plaintiff Class Because His "Deal" With Potential Defendants Prevents Him From Exercising His *Independent* Professional Judgment On Behalf Of The Class Members.

The potential defendants have in fact affected the course and conduct of the litigation. The conflict of interest created by the financial relationship between Plaintiffs' Counsel and the Underwriter, Liss, a potential defendant in this case, prevented Plaintiffs' Counsel from considering class claims against Liss. Liss provided most of the money that Plaintiffs' Counsel demanded in order to take this case. In exchange, Plaintiffs' Counsel agreed not to sue Liss.

Plaintiffs' Counsel asserts that his decision not to sue Liss can be justified as a strategic decision. However, Counsel's analysis of that strategy is constrained by his deal with Underwriter. Once Plaintiffs' Counsel struck a deal not to sue a potential defendant all subsequent decisions cannot be the result of Counsel's independent judgment. In this case, that deal was struck before Counsel investigated or evaluated any of the potential claims.

Plaintiffs incorrectly assert that Respondent found the decision not to sue Liss was a "strategic decision" by Plaintiffs' Counsel. Plaintiffs' Counsel argues that this Court should not correct Respondent's error in this writ proceeding because review in a writ

proceeding is limited to abuses of discretion, not findings of fact. (Plaintiffs' Br. 40-41.) Such an argument misunderstands Relators' position and misrepresents Respondent's Order (prepared by Plaintiffs' Counsel) granting Plaintiffs' Motion for Class Certification. Contrary to Plaintiffs' assertions, Respondent ***did not find*** that the deal between Plaintiffs' Counsel and potential defendants not to sue those potential defendants in exchange for money and information was a strategic decision. The selected quotations Plaintiffs rely on were taken out of context.

Plaintiffs delete important language from the beginning of the quote they use. The deleted language actually states: "***Defendants have challenged*** plaintiffs' counsel's ***qualifications to act as class counsel based on their"*** having accepted information, documents and financial assistance from third parties he agreed not to sue. (Br. App. at A-2 (deleted language emphasized).) The Order goes on to state that "[t]he Court finds that the foregoing circumstances do not justify declining to certify a class or refusing to allow plaintiffs' counsel to proceed forward with this action." (*Id.* (quotation omitted from Plaintiffs' Brief).) Nowhere does Respondent acknowledge that Relators' challenge was based upon a conflict of interest. Nowhere does Respondent decide and state whether, or not, the deal between Plaintiffs' Counsel and potential class defendants creates a conflict of interest.

Later in that paragraph, the Order states: "***The relevant circumstances will be disclosed in the notice to class members, and any class member who may disagree with the*** strategic decisions made by the class representatives and plaintiff's counsel ***may elect to opt out of the class.***" (*Id.* (deleted language emphasized).) However, the Order fails to

specifically state what "relevant circumstances" should be disclosed. By requiring that "the relevant circumstances" be disclosed, Respondent indicates that a disclosure must take place to cure some problem.

This is a far cry from having found that Counsel's deal with potential defendants was a "strategic decision." Notably, Respondent never determined whether the money potential defendants paid to Plaintiffs' Counsel in exchange for a promise not to sue created a conflict of interest or whether Plaintiffs' Counsel could fairly and adequately represent absent class members, as opposed to the named plaintiffs. Significantly absent from Respondent's Order are any factual findings or determinations relative to the propriety of Counsel's deal with potential defendants.

After hearing three days of evidence and argument, Respondent had the opportunity and was requested by Relators to factually determine whether Counsel's deal created a ***conflict of interest*** preventing fair and adequate representation. The Order's failure to specifically address that request or make a determination as to this issue is telling in its silence. Moreover, when the Order states that Relators' challenge to the qualifications of Plaintiffs' Counsel to act as class counsel "do not justify declining to certify a class or refusing to allow plaintiffs' counsel to proceed forward with this action" (*id.*), Respondent improperly shifted the burdens of proof and persuasion from the plaintiffs, who sought class certification, to the defendants who opposed it.

A. Underwriter Liss was part of the consortium that initially hired Plaintiffs' Counsel for $20,000 to represent six individual bondholders in the Equity Case and later investigate potential class claims in exchange for Counsel's promise not to sue.

Plaintiffs' Counsel has always asserted that he was initially paid $20,000 by a consortium of brokers to represent bondholders. In the Equity Case, Plaintiffs' Counsel asserted that he represented only six individual bondholders. In this case, he asserts that he was retained to represent a potential class at that time. The initial engagement letter speaks for itself.[5] (*See* Br. App. at A-8 through A-10.) Plaintiffs' Counsel promised "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 claims, asserted against Magna Bank, Robert Chlebowski and/or others." Nevertheless, Plaintiffs' Counsel has always asserted that, despite the absence of any written agreement, there has always been an implicit understanding that Plaintiffs' Counsel would not investigate or advise bondholders about potential claims against the consortium that paid the $20,000 retainer. Underwriter Liss was a member of that consortium.

In their brief (Plaintiffs' Br. at 47), Plaintiffs allege that Relators are "flat wrong" that Liss was a member of the consortium that paid the $20,000 retainer and that Relators failed to cite the record support for this fact. Although Relators did not cite to the record

[5] Plaintiffs never mention this engagement letter anywhere in their brief.

in the argument section of their Brief (*see* Relators' Br. at 54), Relators cite record support for this fact in their Statement of Facts (*see id.* at 21). Plaintiffs on the other hand, without any support for their position,[6] assert that Liss did not pay part of the $20,000 retainer. In fact, Liss was part of the consortium. One of the brokers who initially approached Plaintiffs' Counsel testified that while he did not contribute anything to Counsel's $20,000 retainer, Liss did. Specifically:

> Q: Did anyone provide him payment for that representation of the bondholders?
>
> A: Yes.
>
> Q: Who was that?
>
> A: That I know ---there may have been others, but that I know of, Aragon, Cutter and Company, Liss.

(Ex. 1, Bax Dep. at 56.)

[6] Although Plaintiffs cite Greiman's hearing testimony (Plaintiffs' Brief at 47 (citing Ex. 32 at 106, 114, 119; Ex. 33 at 210-11, 219)), for the proposition that the initial $20,000 retainer was paid by three brokers and not Liss, the record does not support that allegation. The only testimony arguably probative is Greiman's testimony that he ***believes*** the initial $20,000 came from David Bax, Bill Glaser, and Bill Meyer. (*See* Ex. 33 at 210-11.) David Bax, on the other hand, testified that he paid none of the initial $20,000, but he ***knows*** some of it was paid by Liss. (Ex. 1, Bax Dep. at 56, 123-24.)

Q: Do you know who paid Mr. Greiman with respect to the equity suit?

A: A consortium of broker dealers.

Q: Not you?

A: Not me.

Q: Who was in that consortium?

A: I have already answered that question.

Q: Was Mr. Liss one of them?

A: Yes, he was.

(Ex. 1, Bax Dep. at 123-24.)

This testimony establishes that, as part of the consortium that paid the initial $20,000 retainer, Liss was one of the parties that Plaintiffs' Counsel could not sue because Liss was paying Counsel's fees. As a result, Plaintiffs' Counsel never made a "strategic decision" not to sue Underwriter. Plaintiffs' Counsel was constrained from suing Liss all along.

B. Plaintiffs have attempted to bolster their assertions that the decision not to assert class claims against Underwriter resulted from "strategy" by minimizing the money Liss and the brokers paid to Plaintiffs' Counsel.

Plaintiffs' Brief attempts to minimize the fact that Liss and the brokers paid money to Plaintiffs' Counsel by asserting that bondholders contributed to the retainer. However, there is no evidence that Plaintiffs' Counsel ever asked any of the bondholders to pay any

part of Counsel's fees. Plaintiffs' Counsel did tell the potential defendants that he would not pursue the case unless he was paid $100,000 (Plaintiff's Br. at 22), in addition to the $20,000 he had already been paid by Liss and other brokers.

Although Plaintiffs' Counsel asserts bondholders contributed to the retainer, Plaintiffs' Counsel has no record of who paid what amounts. (*See* Ex. 33 at 199.) The record reflects only a single $100 contribution by one of the Plaintiff Representatives. The only record evidence of any payment by any bondholder is that one of the Plaintiff Representatives, Schultheis, contributed $100 even though he did not realize the class would not be suing Liss until the day his deposition was taken in December 2000. (Ex. 10, Schultheis Depo. at 69, 134). That is the only record evidence that any bondholder contributed anything to the $120,000. In contrast, Liss paid at least $65,000 of the retainer fund. (*Id.* at 27.)[7]

C. Plaintiffs' Counsel's attempts to rationalize the ways in which he agreed to limit his representation as strategic decisions are ineffective *post hoc* justifications for conflict-created constraints upon Counsel's judgment.

Plaintiffs describe each limitation on the representation provided by Plaintiffs' Counsel as a limitation Counsel — and later Plaintiffs — voluntarily accepted for

[7] Other than the references on pages 22 and 27 of Plaintiffs' Brief, Plaintiffs do not mention or address the amounts of Counsel's retainer demand or Liss's payments. Neither do they explain that their investment will be repaid from any class recovery before the class members would receive any award.

"strategic" reasons. As discussed above, the limitations existed from the inception of the representation. When potential defendants hired Plaintiffs' Counsel to represent the Plaintiffs, it was with the undisclosed, implicit understanding that Plaintiffs' Counsel would not investigate, evaluate, or advise Plaintiffs regarding claims they might have against these potential defendants. From the beginning, the forbidden claims included claims against Liss.[8]

Plaintiffs' Counsel dismisses the $120,000, paid almost entirely by potential defendants, as if it were a necessary evil that did not influence Counsel's judgment, and pretends that the choice not to pursue — not even to advise Plaintiffs about — claims against potential defendants was made for other reasons. Plaintiffs argue that Plaintiffs' Counsel's "strategic decisions' should not be evaluated with the benefit of hindsight. That argument cuts against Plaintiffs' position because their *post hoc* justifications for the deal Plaintiffs' Counsel made with potential defendants relies entirely on hindsight. At no

[8] According to Plaintiffs' Counsel, when he accepted payment from the consortium of brokers that hired him to represent certain bondholders in the Equity Case and to investigate potential claims bondholders might have against third parties, Plaintiffs' Counsel was unaware that Liss was part of that consortium. (*See, e.g.*, Plaintiffs' Br. at 47.) If that is the case, Plaintiffs' Counsel accepted payment of fees in exchange for limiting the advise and representation provided to Counsel's clients without even knowing what those limitations were. There is nothing "strategic" about blindly agreeing to forego certain claims without even knowing what those claims might be.

point in time before agreeing not to sue Liss or the brokers did Plaintiffs' Counsel explain to any of the Plaintiffs the pros and cons of electing not to sue certain potential defendants. All of the excuses for why Plaintiffs' Counsel made a deal not to sue Liss and the brokers were raised after the Plaintiffs' Counsel made the deal.[9]

[9] As an example, Plaintiffs' Counsel asserts that he needed to agree not to sue Underwriter, because Plaintiffs' Counsel needed Underwriters' cooperation to get the allegations that Plaintiffs' Counsel asserts in Plaintiffs' Petition. Relators fully address the ways in which Plaintiffs' Counsel could have obtained this information without Underwriter's assistance. It matters little whether this is reviewed in hindsight or not. Plaintiffs' Counsel had no idea whether, or not, he had to compromise his ability to assert all potential class claims because Plaintiffs' Counsel took no steps to determine whether he could get the information any other way. Plaintiffs' Counsel never even bothered to ask any of the Plaintiffs what they might know, or what information they might have.

Plaintiffs' Counsel argues that he needed Underwriters' help because he needed to learn privileged information from Underwriters' counsel. The "privileged" information is two phone calls Underwriters' counsel had with third parties (a call with a bank officer and a call with the Trust's attorney). Plaintiffs' Brief is the first time that Plaintiffs' Counsel has suggested these third-party conversations could in any way be privileged and he cites no authority for such a proposition.

1. Plaintiffs' new argument that the possible existence of unknown, unseen, arbitration agreements might have complicated some unspecified, unidentified potential class claims against Liss is unsupported by law or fact.

One of the primary excuses repeatedly raised for not suing the Underwriter was that the Underwriter would have arbitration agreements with the class members, even though Greiman never saw any arbitration agreements regarding Liss (Ex. 32 at 122), and that those unseen agreements would preclude a class action suit (*id*. at 125). After Relators' Brief explained that arbitration rules prohibit arbitration of class-action claims (Br. at 52-54), Plaintiffs have modified their argument. They now take the position that they did not contend arbitration clauses would ***defeat*** class treatment of certain claims, but rather that they might ***complicate*** class certification. (Plaintiffs' Br. at 48 n. 10.) However, that is not what Greiman's testimony was at the hearing:

> Q: (By Mr. Conlisk) Mr. Greiman, if Mr. Liss had those arbitration agreements that you assumed at the time he did, what was your consideration about how that might bear upon claims that would be asserted by all the members of the class?
>
> A: Well, the consideration was that they may require such claims to be brought in arbitration and not in a class

> action, which would make them unsuitable for this action.

(Ex. 32 at 125.) Plaintiffs' Brief is contrary to Greiman's testimony and their position only changed after reviewing Relators' brief which establishes that the arbitration "excuse" simply is unfounded.

Plaintiffs now argue that the unseen arbitration clauses might complicate class certification. They argue that the NASD Rules regarding non-arbitration of class action claims would only apply to agreements entered into after 1992. There is no such limitation in the NASD rule and no basis for such an argument. A member of the NASD, such as the Underwriter, must comply with the NASD rules and cannot enforce any arbitration agreement against a customer's claim that is part of a putative or actual class action.

Plaintiffs also assert that the NASD class action exclusion applies only if the claimant has elected to participate in the class action. That is not what the Rule says. In fact, before a claim that would otherwise be part of a class action can be arbitrated, the Rule actually requires a claimant to demonstrate that it has elected not to participate in the putative or certified class action, or, if applicable, has complied with any court-ordered conditions for withdrawing from the class. Plaintiffs' representation that the rule requires a claimant to elect to participate in the class before the rule applies is false. (*See* Plaintiffs' Br. App. at A-27.)

2. Plaintiffs erroneously argue that the evaluation of the Trust's potential contract claims against Red Oak by the Special Master in the Equity Case somehow validates the inability of Plaintiff's Counsel to pursue the bondholders' potential claims against Red Oak — claims Plaintiffs' Counsel never evaluated.

The court in the Equity Case appointed a Special Master to investigate a potential claim by the Trust against Red Oak, a Liss entity, on the basis of Red Oak's guarantee. Under the terms of the Indenture, the Bank, as trustee, could only bring contract claims against Red Oak. St. Louis Leasing had filed for bankruptcy protection which, under the Credit Agreement signed by Red Oak, terminated Red Oak's liability. As a result, the Special Master concluded that the Trust did not have a viable contract claim against Red Oak.

Plaintiffs' failure to sue Red Oak, and the inability of Plaintiffs' Counsel to sue Red Oak is one example of how the deal between Plaintiffs' Counsel and Liss prevents Plaintiffs' Counsel from fairly and adequately representing the absent class members. However, in their Brief, Plaintiffs erroneously assert that Relators' criticism is based on Plaintiffs' Counsel's failure to pursue contract claims against Red Oak. Plaintiffs suggest that the failure to pursue potential class claims against Red Oak is somehow validated by the fact that the Bank and the Trust did not pursue their potential contract claims. (Plaintiffs' Br. at 32-34.) Plaintiffs go so far as to argue that Relators' criticism has been

duplicitous and Plaintiffs assert that Relators have backed away from their criticism on this issue after the Special Master's report in the Equity Case was unsealed.

These arguments relating to Red Oak are a red herring. Plaintiffs misrepresent both Relators' position and the facts. Plaintiffs' failure to pursue potential class claims against Red Oak is merely one example of the inadequate representation Plaintiffs' Counsel and Plaintiff Representatives have provided. Relators have focused a great deal on the inability of Plaintiffs' Counsel to pursue claims against Liss because that alone prevents Plaintiffs' Counsel from fairly and adequately representing the absent class members. However, Relators have not backed away from their position that the Plaintiffs' failure to pursue potential class claims against Red Oak also demonstrates the conflict of interest that prevents Plaintiffs' Counsel from fairly and adequately representing the absent class members.

Although the Bank and the Trust could only assert contract claims against Red Oak — claims that were no longer viable after St. Louis Leasing's bankruptcy — the bondholders could have brought tort claims such as fraud or negligent representation against Red Oak. The Special Master did not investigate whether the bondholders had claims against Red Oak (Ex. 34 at 99), and he did not investigate whether there were any tort claims against Red Oak (Ex. 34 p. 107). Therefore, the Special Master's report does not in any way validate the conduct of Plaintiffs' Counsel.

Plaintiffs' Counsel did not investigate any tort claims against Red Oak (Ex. 34 at 88), and he did not investigate Red Oak's financial viability (Ex. 34 at 89-91). Even more blatant was the failure of Plaintiffs' Counsel to advise the bondholders that he did not

investigate tort claims they may have against Red Oak and to consult with them regarding any such potential claims before he agreed not to sue this entity owned by Liss. Nevertheless, Plaintiffs' Counsel agreed not to sue Liss or any entity with which he is affiliated, including Red Oak.

3. Plaintiffs' assertion that Relators have not been prejudiced by Plaintiffs' failure to sue Underwriter because of the possibility that Underwriter could be subject to third-party indemnification claims misrepresents the case's procedural posture and ignores the real issue of prejudice to absent class members.

Plaintiffs suggest that Relators' attempts to bring Underwriter and the brokers into this case as third-party defendants has somehow prevented Relators from being "prejudiced" by Plaintiffs' failure to sue Underwriter as a defendant. (Plaintiffs' Br. at 43 n. 9, 72.) However, Liss and his company, the third-party defendants, have pending motions to dismiss the Bank's third-party petition on the grounds that they are not obligated to indemnify the Bank and they are not liable for contribution. There is no assurance that the motion will be denied or that any denial will be affirmed on appeal.

More importantly, this argument misses the point. Relators are prejudiced by the fact that Plaintiffs' Counsel's conflict of interest undermines the validity and finality of the class action process. Relators' claims as defendants in this action for contribution and indemnity against Liss and the brokers are far more limited than the potential direct claims bondholders would have against Underwriter and the brokers. The issue in this

proceeding is whether Plaintiffs' Counsel and the Plaintiff Representatives, as chosen by potential defendants, are fairly and adequately representing the absent class members. Relators' potential third-party claims against parties whom the class could and should have sued directly do not make up for the fact that Plaintiffs' Counsel's conflict prevents Counsel from pursuing all potential class claims on behalf of the class. The filing of third-party petitions does not toll the running of the statute of limitations on direct claims the Plaintiff class may have against Underwriter, the brokers, or others not joined.

Plaintiffs' response to Relators' attempts to bring Liss and the brokers into this case demonstrates the influence of these potential defendants over the course and conduct of this litigation. Plaintiffs opposed the Marshall & Stevens motion to join Liss. (Ex. 34 at 53-54.) Greiman even recommended a good friend of his, who now represents Liss in this case. (Ex. 34 at 55-57.) In fact, the nature of the claims Plaintiffs have asserted against the Bank may have been influenced by the possibility of third-party claims that the Bank could then assert against Liss. Plaintiffs' claims against the Bank are all breach of contract claims. Plaintiffs have avoided asserting tort claims against the Bank, apparently to avoid the tort claims against Liss and the brokers for contribution and indemnity.

III. A Notice To Absent Class Members That Plaintiffs' Counsel Struck A Deal Preventing Him From Evaluating And Advising Plaintiffs About All Potential Class Claims Would Not Change The Fact That A Conflict Of Interest Prevents Plaintiffs' Counsel From Fairly And Adequately Representing The Interests Of Absent Class Members.

Under the circumstances of this case, a notice to absent class members will not remedy the conflict of interest that prevents Plaintiffs' Counsel from fairly and adequately representing the absent class members. Missouri Supreme Court Rule 4-1.8(f) recognizes that, under certain circumstances, a client may consent to the potential conflict of interest arising when a third party pays a client's attorney. However, the Comment to that Rule is more specific about this in the context of a class action. It authorizes an attorney to obtain consent on behalf of the class by way of a court-supervised procedure.

Plaintiffs argue that courts in two cases have granted class certification even though a third party paid the plaintiffs' legal fees. (Plaintiffs' Br. 61 (citing *McClendon v. Continental Group, Inc.*, 113 F.R.D. 39 (D.N.J. 1986) and *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653 (E.D. Mich. 1995).) However, in both cases the third party was a union paying the legal services for its union members to protect their rights. In both cases the courts found no evidence supported any claim against the unions by its members. Therefore, there was no conflict. Furthermore, in neither case did the class

representatives agree that the unions should not be sued.[10] There is no case with facts like this that would even consider using an opt out process to obtain informed consent.

Moreover, consent is not enough. Consent to payment does not remedy conflict when payment interferes with "lawyer's independence of professional judgment or with the client-lawyer relationship." Mo. S. Ct. R. 4-1.8(f)(2). The Comment to Rule 4-1.8(f) also requires that arrangements for third-party payment of attorneys' fees must conform to the requirement of Rule 1.7 concerning conflict of interest. Missouri Supreme Court Rule 4-1.7(b) states that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibility to a third person.

Here, the representation of the class is limited by Counsel's agreement not to sue Liss and others. This conflict cannot be waived. Plaintiffs' Counsel has compromised his duty of loyalty because he agreed to a deal with potential defendants that limits his ability to investigate, evaluate, or advise Plaintiffs with respect to any claims against potential defendants who paid his fees. That limitation and its interference with the relationship between Plaintiffs' Counsel and Plaintiffs cannot be waived on behalf of absent class members.

[10] Although Plaintiffs contend that the court held that the UAW had potential liability, the court actually said: "given that the claim against the UAW in the case at bar has been dismissed, there is no evidence that this Union will be required to indemnify Massey-Ferguson even if the Plaintiffs prevail." 172 F.R.D. at 664.

Plaintiffs rely on *Biben v. Card*, 1986 WL 1199 (W.D. Mo.), to argue that notice to the class of Plaintiffs' Counsel's decision not to pursue certain claims would protect the class members' interests in the unasserted claims. (Plaintiffs' Br. at 67.) *Biben* is inapposite. *Biben* did not involve Rule 1.8(f) or a situation where the class counsel agreed not to sue someone in exchange for a retainer paid by the dropped party.

In *Biben*, the plaintiffs' counsel was originally faced with multiple individual claims in multiple complaints, only one of which asserted claims against a specific brokerage and certain individual brokers. *Biben*, 1986 WL 1199, *9. When the separate cases were consolidated, and when plaintiffs' counsel filed a consolidated class action complaint, the plaintiffs dropped the individual claims against the individual brokers. *Id.*

The court was concerned because, under an undeveloped theory, if plaintiffs could establish that the single brokerage exercised enough influence in the market for the securities at issue, it might be possible to make a class claim against that one brokerage. *Id.* The court found this troubling even though such a claim was speculative and the actual omitted claims were individual claims against one brokerage and were not acknowledged class claims. *Id.* & n.15 (finding difference between class claims against defendants whose representations were disseminated nationwide, and individual claims against individual brokers and brokerage who were dropped). In this case, Plaintiffs' Counsel has acknowledged that he has failed to assert actual, ***existing class claims*** against Underwriter.

The "right" of Plaintiff Representatives and Plaintiffs' Counsel to choose claims and the parties against whom claims are asserted is necessarily circumscribed by their

obligation to adequately represent the entire class. *See Biben*, 1986 WL 1199 at n. 15. Plaintiffs argue (Plaintiffs' Br. p. 43), citing the federal case of *Kline v. First Western Government Securities, Inc.*, 1996 WL 153641 (E.D. Pa. 1995), that the plaintiffs and their counsel have the right to decide who to sue. However, in *Kline*, the plaintiffs' counsel did not take money from the party they decided not to sue. Rather, the plaintiffs' counsel apparently decided not to sue the party because they did not have a claim against the party. *Id.* at *10. That is vastly different than this case where Plaintiffs' Counsel took money from the party they then agreed not to sue and where Plaintiffs' Counsel did not even investigate the claims against the potential defendant and even ignored the evidence they had of the claims against the Underwriter.

Biben in no way stands for the proposition that Respondent can eliminate the type of conflict at issue in this case by providing class members with notice. Notice to the class members does not somehow change limited representation — representation that has been constrained by a deal in which potential defendants pay Plaintiffs' Counsel not to assert certain class claims — into fair and adequate representation by notifying the class that Plaintiffs' Counsel suffers from a conflict of interest. The *Biben* decision actually stands for the proposition that courts must carefully scrutinize the decisions by class counsel not to assert certain claims. The "requirements of court approval and notice to class members before a class action is dismissed or compromised apply even for dismissal as to some of the defendants and even prior to the court's determination of whether a class is to be certified." *Biben*, 1986 WL 1199 (citations omitted).

The *Biben* court even indicated that a formal motion to delete the individual claims against the brokerage might be required despite the fact that those claims had never been asserted as class claims. The notice prescribed by the court was not a notice that the class counsel was unable to advise the class regarding certain potential class claims because the class counsel had a conflict of interest that prevented counsel from representing the class in all of its potential class claims. Rather, the court merely required notice to those class members (individual plaintiffs) that had asserted individual claims against the dropped brokers and brokerage firm to inform those plaintiffs that their individual claims were not being asserted in the class proceedings and must be pursued outside the context of the present case.

Plaintiffs argue that the lawyer's duty to consult with the client to obtain the client's consent to the conflict is minimal, citing *Levy & Craig, P.C. v. C.W. Luebbert Construction Co.,* 58 S.W.3d 81 (Mo. App. W.D. 2001). Plaintiffs contend they only need to orally say there is a conflict and that would satisfy the obligation of consultation required by Rule 4-1.7(b) and 4-1.8(f). However, the circumstances in the *Levy* case are substantially different from the circumstances here. *Levy* involved an instance where initially there was a potential conflict of interest that the lawyer discussed with Luebbert. Luebbert claimed there was no conflict and he assured the law firm that Luebbert had worked an arrangement with the other subcontractors, one of whom was a client of the law firm, that they would be paid. When the law firm subsequently received information that its other client had not been paid and Luebbert did not have an arrangement with the

other client regarding payment, the law firm withdrew from the case citing the conflict of interest and sued Luebbert for its fees.

Levy is irrelevant to the issues in this matter for several reasons. There was no issue in the *Levy* case regarding whether or not the lawyer satisfied the duty to consult with the client and the opinion indicates that the lawyer discussed the conflict with Luebbert. Furthermore, the nature of the claims by the subcontractor against Luebbert was clear, and the basis of the conflict was clear. The case does not support Plaintiffs' argument that the duty to consult with a client before obtaining the client's consent is minimal.

To justify a client's waiver of a conflict, the lawyer must establish that the attorney fully disclosed to the client *all* pertinent facts that might affect the client's decision whether or not to waive the conflict. *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) and comment (2000). Plaintiffs' suggestion that "consent after consultation" only requires the lawyer to provide minimal information to the client is an inaccurate statement of the law, and the *Levy* case cited by the plaintiffs does not support that proposition.

Truly informed consent to the already consummated agreement not to sue certain unnamed persons would have required Plaintiffs' Counsel to describe the deal he made, the pros and cons of the deal, an identification of the persons he had agreed not to sue, what the possible claims against those persons might be including the facts, what

information or other assistance justified not suing them, what kinds of confidential information would be shared and the ramifications of doing so, the statutes of limitations involved, whether they should seek independent counsel, and the pros and cons of pursuing the claims against those persons in these proceedings. Furthermore, the minimal amount of information provided to the Class Representatives, assuming *arguendo* that the Class Representatives could waive a conflict for the unnamed class members, was so miniscule as to be inadequate. (*See* Relators' Brief at 60-64.) In fact, one of the Class Representatives 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). That hardly indicates that the Class Representatives were adequately informed.

Plaintiffs argue (Plaintiffs' Br. 62) that the class representatives need not assert every claim available to the class and that not asserting certain claims may be part of adequately representing the class, citing *Tedesco v. Mishkin*, 689 F.Supp. 1327 (S.D.N.Y. 1988). The issue the court was addressing was not whether or not the class should be certified but rather whether one of the class representatives should be disqualified. The class had already been certified. A separate motion had been made to disqualify two class representatives, Chester and Carr. Chester was disqualified for a potential conflict of interest because he could be potentially liable even though the other class representatives detailed evidence to demonstrate that Chester could not be liable. The court refused to disqualify Carr as a class representative even though Carr had asserted and then dismissed a separate suit against Chester. The court noted that Carr would not be

dismissed as a class representative because the class had valid reasons for not naming Chester as a defendant.

Tedesco does not support Plaintiffs' position because it did not involve the certification of a class and because the court determined that there was a valid tactical reason for not asserting the claim. *Tedesco* did not involve the conflict of interest involved in this case. In this case, the reason for failing to investigate the claims against the Underwriter and brokers and for agreeing not to sue them was the payment of the Plaintiffs' Counsel's retainers, not the merits of the claims.

This class action has been tainted from its inception. In addition to limiting the claims that Plaintiffs' Counsel could investigate and assert, potential defendants controlled access to the potential plaintiffs and solicited the plaintiff representatives. Plaintiffs' Counsel asserted some claims on behalf of the class, but omitted other known class claims without ever advising the class members or even adequately informing the Plaintiff Representatives about those claims. Under these circumstances, no absent class member is fairly and adequately represented. Accordingly, this case cannot proceed as a class action.

CONCLUSION

For the reasons set forth above and in Relators' Brief, 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,

MOSER AND MARSALEK, P.C.

By: _____
Brian R. Plegge, #32500
Carrie Wrisberg, #42814
200 North Broadway, Ste. 700
St. Louis, MO 63102-2730
(314) 421-5364
(314) 421-5640 (fax)

Attorneys for Relator Marshall & Stevens, Inc.

BLACKWELL SANDERS PEPER MARTIN LLP

By: _____
John C. Rasp, #20170
Michael A. Clithero, #31402
Geoffrey Gerber, #47097
720 Olive Street
St. Louis, MO 63101
(314) 345-6000
Fax: (314) 345-6060

Attorneys For Relator Union Planters Bank, N.A.

GALLOP, JOHNSON & NEUMAN, L.C.

By: _____
Frank Susman, #19984
Kenneth B. Newman, #39720
Andrew D. Dillon, #32965
101 South Hanley
St. Louis, MO 63105
(314) 615-6000
(314) 615-6001 (fax)

Attorneys for Relators Michael J. Doster and Doster, James, Hutchinson & Ullom, P.C.

GREEN SCHAAF & JACOBSON, P.C.

By: _____
Martin M. Green, #16465
David T. Butsch, #37539
7733 Forsyth Boulevard, Ste. 700
St. Louis, MO 63105
(314) 862-6800
(314) 862-1606 (fax)

Attorneys for Relators Robert Chlebowski and Lynne Frownfelter

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 12th day of March, 2004, as indicated below.

Honorable Larry L. Kendrick
Circuit Judge, Division 17
St. Louis County Circuit Court
7900 Carondelet
St. Louis, MO 63105

Respondent

Gerald P. Greiman
Daniel V. Conlisk
Patrick T. McLaughlin
Spencer Fane Britt & Browne, LLP
1 North Brentwood Blvd., Suite 1000
St. Louis, MO 63105

Attorneys for Plaintiffs

Richard E. Greenberg
Greensfelder Hemker & Gale
10 South Broadway, Suite 2000
St. Louis, MO 63102-1774

Attorney for J. E. Liss & Company, Inc. and Red Oak Financial, Inc.

_____

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

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

1. Relators' Reply Brief (excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix) contains 7,731 words, based upon the word count of the word-processing software used by the undersigned and, therefore, does not exceed the 7,750 words allowed under Rule 84.06(b).
2. Relators' Reply 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.

BLACKWELL SANDERS PEPER MARTIN LLP

By: _____

John C. Rasp, #20170
Michael A. Clithero, #31402
Geoffrey Gerber, #47097
720 Olive Street, 24th Floor
St. Louis, MO 63101
(314) 345-6000
(314) 345-6060 (fax)

Attorneys For Relator Union Planters Bank, N.A.