IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA

LARRY J. BELIN, individually and on behalf of all others similarly situated, Plaintiff, v. THOMAS L. WHITE, JR., in his official capacity as Comptroller of the State of Alabama; and RICKY J. MCKINNEY, in his official capacity as Director of the Alabama Office of Indigent Defense Services; Defendants.	*	Case No. CV-2011-901488.00-EWR

ORDER APPROVING SETTLEMENT

The parties have entered into a Memorandum of Settlement ("the Agreement") of this class action, which is subject to review under Rule 23(e) of the Alabama Rules of Civil Procedure. The Court has read and considered the Agreement and the affidavits, motions, and memoranda submitted in support of the settlement, as well as the two objections which relate solely to class counsel's requested attorney's fees.

No class member objected to any other provision of the settlement, which pays all affected lawyers in both classes 100% of all compensation due to them by the Defendants for indigent representation the affected lawyers have been denied, or would be denied at some point in the future.

The Court held a hearing on the proposed settlement on September 12, 2012 and has considered all evidence and comments presented at the hearing as well.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Court approves the Settlement submitted by the parties, and overrules all objections.

2. The Settlement is specifically found to be fair, adequate and reasonable. It gives each class member as full and complete relief as they could realistically expect under applicable law, in a relatively quick and inexpensive timeframe. No further or better relief is likely to be obtained for the class members in this action, and any attempt to do so would likely require protracted and uncertain litigation and appeals.

3. The Court has jurisdiction over the subject matter of this Action, the Plaintiff, the other members of the Settlement Classes, and the Defendants.

4. The Court certifies the following classes as proposed in the Settlement:

GAL Class: All Alabama lawyers who

a. have been appointed by any judge as a Guardian Ad Litem ("GAL") in any Domestic Relations case, including Child Support, Paternity, Juvenile, Dependency, Delinquency, and Need of Supervision, in any Alabama state court at any time prior to the date of final judgment in this action; and

b. who were previously denied payment by the Comptroller for services as such GAL after submission of a judicially-approved fee declaration, or

c. who have not previously submitted a judicially-approved fee declaration for such services to the Comptroller, but who would be denied payment upon such submission under the Comptroller's policy stated in his Memorandum dated October 25, 2010 (Exhibit A, Third Amended Complaint).

Pre-June 14, 2011 Class: All Alabama lawyers who

a. have been appointed by any judge to represent any indigent person in any

Alabama state court at any time before June 14, 2011; and

b. who have provided legal services pursuant to such appointment for which payment would be due under Alabama statutory and case law; and

c. who have been denied payment, or but for this Settlement would be denied payment, for such services upon submission of a judicially-approved fee declaration under the OIDS policy stated in the Memorandum dated January 17, 2012 (Exhibit B, Third Amended Complaint).

Exclusions: Each of the two classes above excludes

a. all lawyers who provided any such services as "contract counsel" under § 15-12-26, Code of Alabama or as "public defenders" under § 15-12-41, Code of Alabama; and

b. all lawyers whose fees as GAL are or were ordered by the court to be taxed as costs to any party under Ala.R.Civ.P. 17(d).

5. The Court appoints Larry J. Belin as class representative of both of the above-described classes, and appoints his attorney of record George C. Douglas, Jr. as class counsel.

6. The Court makes the following findings under Rule 23, Ala.R.Civ.P., after employing the rigorous analysis required by Ala.Code § 6-5-641(e). Rule 23, Ala.R.Civ.P. governs certification of a class action. This rule is identical to the corresponding federal rule, and federal case law on class actions is persuasive authority for the interpretation of Alabama's rule. *Adams v. Robertson*, 676 So. 2d 1265, 1268 (Ala. 1995), cert. dismissed, 520

U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997).

Rule 23(a) states the prerequisites for class treatment, and Rule 23(b) provides procedural and substantive criteria for certification.[1]

Rule 23(a)

First, Rule 23(a) requires that Rule 23(a) requires: (1) that joinder of all class members is impracticable ("numerosity"); (2) that the claims of the putative class members share common questions of law and fact ("commonality"); (3) that the claims of the plaintiffs are typical of those of the class as a whole ("typicality"); and (4) that the named plaintiff and counsel will continue to adequately represent the interests of the class members ("adequacy of representation"). Each of these prerequisites is met here.

Numerosity

There is no "bright-line" numerosity test. Courts have certified classes as small as 35, 40, 50, 70 and 100 persons. *See e.g., Kilgo v. Bowman Transportation, Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (finding numerosity requirement met where plaintiff identified 31 potential class members). As a general rule, proposed classes consisting of 40 or more members will satisfy the numerosity requirement. *See Cox v. American Case Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). In *Afro American Patrolman's League v. Duck*, 503 F.2d 294 (6th Cir. 1974), the Sixth Circuit Court of Appeals held that a class of 35 satisfied the numerosity requirement.

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[1] The parties' Joint Motion for Preliminary Approval also stipulates to these factors (see pp. 6-10 which describe the problem with inability to identify class members, typicality of claims, commonality of issues, and adequacy of representation). Ala.Code § 6-5-641(e) permits a trial court to accept such stipulations where as here, all parties have so stipulated and the court is satisfied (as here) that such factors have been shown and/or could be proven.

Because the State has no records from which the identities or number of class members can be determined, joining all class members is obviously impracticable. Class counsel's affidavit regarding notice states that he has been contacted by more than 50 Alabama lawyers who are members of the classes described in the Third Amended Complaint and Settlement Agreement. The Court accepts that representation, which satisfies the numerosity factor.[2]

Commonality

Rule 23(a)(2) requires that there be at least one common question of law or fact. The commonality test is met when there is "at least one issue whose resolution will affect all or a significant number of the putative class members." *Forbush v. J.C. Penney Co.,* 994 F.2d 1101, 1106 (5th Cir. 1993). Common questions exist whenever the action arises from a nucleus of operative facts. *See Thompson v. Midwest Foundation_Independents Physicians Assoc.*, 117 F.R.D. 108, 112 (S.D. Ohio 1987); *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244, 250 (S.D. Tex. 1978). Commonality is also shown when the party opposing the class has engaged in a course of conduct that affects all class members and gives rise to a cause of action. *See Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 574 (D. Minn. 1995).

Commonality is clearly met here. Each affected lawyer is or will be subject to the same payment policies challenged by Mr. Belin's complaint – these policies are either legal or not, and the issues in the case plainly arise from a "common nucleus of operative facts".

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[2] It is reasonably likely of course that there are many more lawyers in the classes than actually contacted class counsel, since not every class member who received the email notice of this action would necessarily have had a reason to contact class counsel.

Typicality

The Eleventh Circuit has recognized that, "the commonality and typicality requirements of Rule 23(a) tend to merge." *Griffin v. Carlin*, 755 F.2d 1516, 15311 (11th Cir. 1985). Thus, the analysis provided above applies with equal force in connection with the typicality requirement. As the Seventh Circuit said in *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983):

> "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." H. Newberg, Class Actions § 1115(b) at 185 (1977); Resnick v. American Dental Ass'n, 90 F.R.D. 530, 539 (N.D. Ill. 1981).

Mr. Belin's claims clearly typify those of all other class members here and in fact are identical, *e.g.*, "*Whether the State may deny payment to the affected lawyers under the policies at issue in this case?*" The typicality requirement is plainly satisfied here.

Adequacy of representation

The test for determining whether the representative parties will protect the interests of the class is whether there is any conflict between the interests of the plaintiff and other class members, and whether class counsel is qualified and capable. The Eleventh Circuit has stated that:

> The adequacy of representation requirement involves questions of whether plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation, and of whether plaintiffs have interests antagonistic to those of the rest of the class.

Griffin v. Carlin, 755 F.2d 1516, 1533 (11th Cir. 1985); *see also Cross v. National Trust Life Insurance Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977). Moreover, the defendant bears the burden of demonstrating that the representation is inadequate. *See Lewis v. Curtis*, 671 F.2d

779, 788 (3rd Cir.), *cert. denied*, 459 U.S. 880 (1982). Also see 3 Robert Newberg, *Newberg on Class Actions* § 7.24 at 7-81 to 7-82 (citations omitted),

> In most cases, adequate representation presumptions are usually invoked in the absence of contrary evidence by the party opposing the class. . . . If there are any doubts about adequate representation of potential conflicts, they should be resolved in favor of upholding the class, subject to later possible reconsideration, or subclasses might be created initially.

There is no conflict between Mr. Belin and the absent class members. He has vigorously prosecuted this case for the benefit of the putative class; he seeks the same relief for all class members; and he is clearly an adequate class representative.

Mr. Belin's attorney has submitted affidavits from himself and two other Alabama Lawyers stating that this case was handled well, and the results bear these statements out. Class counsel has pursued the case vigorously and achieved an excellent result in a relatively short time, at a very minimal cost to the class.

The requirement of adequacy of representation has clearly been established here.

Rule 23(b)(2) certification

Rule 23(b)(2) is appropriate when "the party opposing the class has acted on grounds generally applicable to the class as a whole, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole". Here the Comptroller and OIDS have plainly acted on grounds applicable to each affected lawyer (*i.e.*, denial of fees), and the right of the two classes of affected lawyers to be paid is the central issue in the case.

Certification under Rule 23(b)(2)

When the criteria of Rule 23(a) and (b) are met, certification of a mandatory class

under Rule 23(b)(2) is preferable to certification under (b)(1) or (b)(3). *See Wyatt by & Through Rawlins v. Poundstone*, 169 F.R.D. 155, 167 (M.D. Ala. 1995) (Rule 23(b)(2) actions are generally preferred over (b)(3) actions where (b)(2) is applicable; citing *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973)); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th. Cir. 1995) (noting that preference is to certify class under Rule 23(b)(2) or (b)(1) over (b)(3)); *Kyriazi v. Western Electric Co.*, 647 F.2d 388, 393-95 (3d Cir. 1981). One of the reasons for this is the wider res judicata effect of a (b)(2) certification. *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir.), *modified*, 442 U.S. 682, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979). See also *Adams v. Robertson*, *supra* at 1271, where the Alabama Supreme Court said

> ... simply because a Rule 23(b)(1) or (b)(2) class action settlement may ultimately result in an award of money damages does not prevent class certification under those subdivisions. ... So long as the relief sought is primarily equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper. ... Nothing in Rule 23 forbids monetary relief when the action is brought under Rule 23(b)(2).
> [citations omitted]

The monetary relief to which each affected lawyer will be entitled flows from, and is thus incidental to, the permanent declaratory and injunctive relief that the class as a whole will obtain by the Defendants' withdrawal of the payment policies at issue, and the prohibition against changing fee payment practices unless the law changes. *See Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001):

> By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief....to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established...
>
> (emphasis by the court)

Notice to the Class

7. Although Rule 23(b)(2) does not require notice to the class prior to certification, in this case Class Counsel arranged for notice to be given by an email from the Alabama State Bar to all Alabama lawyers with who had provided an email to the Bar. This assured the widest practicable dissemination to members of the affected classes, who might not otherwise be aware of their right to be paid under the settlement. The affidavit of Bradley G. Carr submitted concurrently with this motion confirms the notice was sent to 15,162 Alabama lawyers,[3] and attached a copy of the actual notice sent by the Bar. Of the 15,162 Alabama lawyers to whom the e-mail was sent, only 101 were returned as undeliverable. According to class counsel's affidavit, he obtained from the Bar a list of the lawyers whose emails were returned and faxed or called each lawyer regarding the settlement and notice. Ultimately only three of these lawyers could not be reached.

8. The Court approves the form, substance, method and requirements of the Class Notice as sent by the Bar and attached to the Carr affidavit. The Court finds that this notice was the best notice practicable under the circumstances to the Settlement Classes; that the Class Notice provides full and accurate information concerning the Settlement and the actions that are involved in the Settlement, and due and adequate notice of the proceedings regarding the Settlement; and that the Class Notice otherwise fully meets the requirements of Rule 23 of the Alabama Rules of Civil Procedure, due process under the Constitutions of the

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[3] Class counsel advised the Court at the September 12, 2012 hearing that according to the Bar's technology personnel, 461 lawyers do not have an email address on file with the Bar. This represents slightly less than 3% of all Alabama lawyers, which is not a significant number especially since this order will direct the Defendants to notify every district, circuit, family, and juvenile court judge, and every district and circuit court clerk in Alabama that the policies at issue in this action have been rescinded.

United States and the State of Alabama, and any other applicable laws.

Injunctive and Declaratory Relief

9. Pursuant to the Agreement, the Defendants' payment policies as stated in Exhibits A and B to the Third Amended Complaint in this action are hereby declared to be unlawful, and the Defendants are hereby ordered to do the following things within five (5) business days after this order becomes final:

(a) Mr. White will issue a memorandum canceling the October 25, 2010 memorandum attached as Exhibit A to Plaintiff's Third Amended Complaint, and cause a copy of that memorandum to be sent to every district, circuit, family, and juvenile court judge, and every district and circuit court clerk in Alabama. Mr. White will also cause a copy of such memorandum to be posted on website of the Alabama Finance Department and the website of the Office of Indigent Defense Services.

(b) Mr. White will also direct his staff to pay all fee declarations submitted by any lawyer appointed as GAL in any Domestic Relations case, including Child Support, Paternity, Juvenile, Dependency, Delinquency, and Need of Supervision, which are regular in form and judicially approved as presently required, subject to the exclusions stated in subparagraph (a) above.

(c) Mr. McKinney will issue a memorandum canceling the January 17, 2012 memorandum attached as Exhibit B to Plaintiff's Third Amended Complaint, and cause a copy of that memorandum to be sent to every district, circuit, family, and juvenile court judge, and every district and circuit court clerk in Alabama. Mr. McKinney will also cause a copy of such memorandum to be posted on website of the Alabama Finance Department and the website of the Office of Indigent Defense Services.

(d) Mr. White will also direct his staff to pay, or approve for payment by the Comptroller, all fee declarations submitted by any lawyer appointed to represent any indigent in any Alabama court prior to June 14, 2011 without imposing any deadline for submission, provided such declarations are otherwise regular in form and judicially approved as presently required, subject to the exclusions stated in subparagraph (a) above.

(e) The Defendants will not thereafter change any appointed fee payment practices relating to fee declarations and/or overhead reimbursements for counsel appointed to represent any indigent, or appointed as GAL in any case, until and unless there is a change in the law effected by legislative act, binding appellate decision, and/or agency rule lawfully promulgated under the AAPA.

(f) The Defendants will give exercise their best efforts to pay all amounts due under this Settlement and Order within 15 business days after receipt of a fee declaration, provided such declarations are regular in form and judicially

approved as presently required.

10. Attorney's Fees

The Plaintiff's Motion for Attorney's Fees is granted. The Court finds that this is a "common fund" case. Regardless of whether an actual "fund" were to be set up, it is clearly an action in which the efforts of class counsel have produced a 100% recovery for every class member. Class counsel's fee request was modest and well below the general range of fee awards in successful class actions, which counsel stated was a courtesy to his fellow lawyers.

The Court cannot conceive of how any lawyer could object to a fee request in this range, especially where the lawyers are themselves receiving full payment for their services which they would otherwise have lost. The fee requested is less than sales tax in most areas of Alabama and only a little more than a typical real estate commission. The objections to this fee request are overruled.[4] The fee request is amply supported by class counsel's memorandum of law and affidavits of counsel and two other Alabama lawyers who are experienced in complex litigation.

Class counsel is awarded attorney's fees of seven percent (7%) of all compensation paid to each lawyer as a result of this action by either or both of the Defendants or their successors. Attorney's fees shall be determined and paid by the Defendants as follows:

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[4] Neither objector cited any authority for the objection. Conclusory allegations or speculation as to issues in a case do not satisfy the proponent's burden of demonstrating his right to prevail on those issues. See *Roberts v. Nasco Equip. Co.*, 986 So. 2d 379 (Ala. 2007); *Crowne Inv., Inc. v. Bryant*, 638 So. 2d 873, 878 (Ala. 1994)); *Riggs v. Bell*, 564 So. 2d 882, 885 (Ala. 1990); *Williams v. Palmer*, 277 Ala. 188, 193, 168 So. 2d 220, 224 (1964).

A. All fee declarations paid to any lawyer in the GAL Class (*i.e.*, any fees for indigent representation as *guardian ad litem* in any Domestic Relations case, including Child Support, Paternity, Juvenile, Dependency, Delinquency, and Need of Supervision, in any Alabama state court) which are not subject to the exclusions in Sec. 4 of this Order (relating to contract counsel and fees taxed to a party as costs) shall be subject to the seven percent (7%) fee deduction.

B. All fee declarations paid by the Defendants or their successors to any lawyer in the Pre-June 14, 2011 Class (*i.e.*, any fees for indigent representation in any civil or criminal case where the appointment was *prior to* June 14, 2011) which are not subject to the exclusions in Sec. 4 of this Order, shall be subject to a seven percent (7%) fee deduction as follows:

1. Any fees for a pre-June 14, 2011 appointment in a case concluded on or before March 1, 2012 where the declaration was not submitted to either of the Defendants by June 30, 2012 (the deadline stated in Exhibit B to the Third Amended Complaint) shall be subject to the seven percent (7%) fee deduction.
2. Any fees for a pre-June 14, 2011 appointment in a case concluded after March 1, 2012 where the declaration was not submitted to either of the Defendants within 90 days after conclusion (the deadline stated in Exhibit B to the Third Amended Complaint) seven percent (7%) fee deduction.

C. The Defendants will pay all fees so deducted to Class Counsel at least monthly as provided in the Settlement Agreement.

11. Appeal Bond

Ala.Code § 6-5-642 limits the right of appeal after a final judgment in a class action to "any party", providing that the final order "shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action." In this case he named plaintiff and the Defendants have both consented to this final judgment, and therefore would have no standing to appeal.

In a class action, only a class member who has objected, intervened, or is otherwise a party (such as a named representative) has standing to appeal. *Boschert Merrifield Consultants, Inc. v. Masonite Corp.*, 897 So. 2d 1048, 1051 (Ala. 2004)("Unless a person is a party to a judgment, he can not appeal from that judgment. That fundamental principle is one

of the oldest in Alabama jurisprudence."; citing *Daughtry v. Mobile County Sheriff's Dep't*, 536 So. 2d 953, 954 (Ala. 1988) and *Mars Hill Baptist Church of Anniston v. Mars Hill Missionary Baptist Church*, 761 So. 2d 975, 980 (Ala. 1999)). However, the *per curiam* opinion in *Perdue v. Green*, 2012 Ala. LEXIS 31 (Ms. No. 1101337; Mar. 16, 2012), from which six of Alabama's nine supreme court justices recused, permitted an appeal by an objector, citing *Devlin v. Scardelletti*, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002).

Assuming either of the objectors here would have standing to appeal this certification and judgment under *Perdue v. Green*, *supra*, does not mean, however, that they should be able to do so without posting a cost and/or supersedeas bond pursuant to Rules 7 and/or 8, Ala.R.App.P. Since the settlement agreement itself provides that it does not become final until all appeals have been resolved, and no class members can be paid until this happens, any appeal would effectively operate as a stay of the entire judgment, to the detriment of the great majority of class members who have not objected. See *In re Checking Account Overdraft Litig.*, 2012 U.S. Dist. LEXIS 18384 (MDL No. 2036, S.D. Fla.; Feb. 14, 2012)

> Objector-Appellants insist that they cannot be required to post a supersedeas bond under FRAP 8 because they have not sought a stay. *See* Hasting and Buycks Opp. [DE # 2396] at 2. However, because the filing of this appeal prevents distribution of the Settlement proceeds as ordered by this Court's Final Judgment, it is an actual stay of Judgment and bond is appropriate. *See In re Broadcom Securities Litig.*, SACV 01-275, 2005 U.S. Dist. LEXIS 45656 (CD. Cal. Dec. 5, 2005) (requiring bond including costs of delay equaling $517,700).

Slip op. at *43, citing *In re Broadcom Securities Litig.*, SACV 01-275, 2005 U.S. Dist. LEXIS 45656 (CD. Cal. Dec. 5, 2005) (requiring bond including costs of delay equaling $517,700).

The federal district court in *Checking Account Overdraft Litig., supra,* noted a number of other class actions in which a supersedeas bond was required, including *In re*

Cardizem CD Antitrust Litig., 391 F.3d 812, 816-17 (6th Cir. 2004) (endorsing the trial court's imposition of a $50,000 appeal bond); *Barnes v. FleetBoston Fin. Corp.*, No. 1:01-cv-1039, 2006 U.S. Dist. LEXIS 71072, slip op. at 2 (D. Mass. Aug. 22, 2006) (ordering imposition of $645,111 appeal bond); *Conroy v. 3M Corp.*, OOcv-2810, 2006 U.S. Dist. LEXIS 96169, Order Granting Plaintiffs Motion For Appellate Bond (N.D. Cal. Aug. 10, 2006) (ordering class action objectors to post an appeal bond of $431,167); and *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 U.S. Dist. LEXIS 25788, 2003 WL 22417252, at *3 (D. Me. Oct. 7, 2003) (granting a motion requiring an objector/appellant to post an appeal bond of $35,000). *See Checking Account Overdraft Litig., supra,* at slip op. *43-44 (note 4).[5]

Accordingly, in the event that either objector (or any other person) files an appeal of this order, the Court will impose such a bond in an appropriate amount upon motion of any party.

DONE AND ORDERED this 9/12/12, 2012.

EUGENE W. REESE
Circuit Judge

[5] One federal district court has suggested that the bond discussed in the above cases is a cost bond, not a supersedeas bond, since it is designed to protect the class members from delay in distribution of settlement proceeds. *See In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 695 F. Supp. 2d 157, 163 (E.D. Pa. 2010). Regardless of which it is called, the law permits such a bond in the trial court's discretion as shown above.