IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DEBBIE HOWARD, and LORA L. NEWSON, on behalf of themselves and all similarly situated persons,

Plaintiffs,

v. No. 2:06-cv-02833 - JMP-tmp

WILKES & McHUGH, PA, a Florida professional association; JAMES L. WILKES, II, a Florida citizen; and TIMOTHY C. McHUGH, a California citizen,

UNDER SEAL

Defendants,

WILKES & MCHUGH, P.A.,

Third-Party Plaintiffs

v.

SPENCER & MARTIN, PLC OR ITS SUCCESSOR IN INTEREST,

Third-Party Defendants.

SEALED ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO CERTIFY CLASSES PURSUANT TO RULE 23

Before the Court is Plaintiffs' Motion for Class Certification (D.E. 220), filed July 31, 2008. Defendants Wilkes & McHugh, PA ("the Wilkes Firm"), James L. Wilkes, II ("J. Wilkes") and Timothy C. McHugh ("T. McHugh") responded in opposition on September 2, 2008 (D.E. 229).

The individual Defendants, J. Wilkes and T. McHugh, also filed a separate response in opposition (D.E. 229). Plaintiffs replied on September 23, 2008 (D.E. 234). The Court held a hearing in this matter on September 25, 2008. Subsequently, the Wilkes Firm supplemented its response (D.E. 243, 245, 253, 257, 260) and Plaintiffs supplemented their memorandum in support (D.E. 244, 256, 261).

Plaintiffs' Motion asks the Court to certify three classes: a Fee Class, a Private Plane Class, and an Expense Class. For the reasons that follow, Plaintiffs' Motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

This case arises from the Wilkes Firm's representation of Plaintiffs Debbie Howard and Lora Newson in lawsuits filed against nursing home facilities. (Second Am. Class Action Compl. ("Compl.").) In May 1999, the Wilkes Firm, in association with a local Tennessee firm Spencer & Martin, P.L.C. ("the Spencer Firm"), opened an estate in Shelby County Probate Court in the name of Howard's grandmother, Bertha Lee Baker. (Id. ¶ 35.) In September 1999, the Wilkes Firm, through the Spencer Firm, filed a wrongful death action on behalf of the Baker Estate in Shelby County Circuit Court against Howard's grandmother's nursing home, Whitehaven Healthcare, Inc., Right Care,

Inc., and Healthcare Management. (Id. ¶ 36.) On June 10, 2002, the Wilkes Firm, through the Spencer firm, submitted a Second Amended Complaint, which alleged multiple acts of "medical negligence." (Id. ¶¶ 38, 39 ("Failure to provide timely medical intervention . . . . Failure to timely and adequately assess and monitor pressure sores . . . . Failure to provide adequate therapy and range of motion to Bertha Lee Baker to prevent the development of contractures . . . .").)

The terms of the Wilkes Firm's fee agreement for the representation of the Baker Estate in claims "resulting from care or treatment to Bertha Lee Baker" included a forty percent contingency fee. (Id. ¶ 43.) In September 2002, the Wilkes Firm negotiated with the nursing home's insurance carrier to settle all claims. (Id. ¶ 48.) The "Closing Statement" was signed by Howard and submitted to the Shelby County Probate Court, which issued an "Order Approving Settlement," containing approval of "Debbie Howard's authority as the Administratrix, and as one of the next of kin, to effectuate settlement of the Personal Injury/Wrongful Death claim . . . and to approve attorney's fees, the allocation of attorney's fees, and the expenses incurred in the litigation." (D.E. 7, Ex. 4.)

In October 2006, an anonymous caller contacted Howard from a pay phone in Tampa, Florida and told Howard that the Wilkes Firm had overcharged her. (Howard Aff. ¶ 9.) Following the call, Howard retained representation and commenced this class action in federal court on behalf of all similarly situated Tennessee clients against the Wilkes Firm and its officers.

Like Howard, Lora Newson's claims against Defendants arise from the Wilkes Firm's legal representation of her in a medical malpractice case against the nursing home that cared for her grandmother. In September 2004, the Wilkes Firm filed suit on behalf of "Eddie Newson, as next friend of Lillie Newson, an incapacitated person" against Allenbrooke Nursing and Rehabilitation Center, L.L.C.; Aurora Cares, L.L.C.; Beverly Enterprises Tennessee, Inc.; Beverly Health and Rehabilitation Services, Inc.; and Beverly Enterprises, Inc. (Id. ¶ 44.) The Newson lawsuit complaint asserted two claims of negligence pursuant to the Tennessee Medical Malpractice Act ("TMMA") for, among other allegations, "[f]ailure to ensure that Lillie Newson received . . . [p]roper treatment, medication and diet . . . [and t]imely nursing and medical intervention." (Id. ¶ 45.)

In June 2006, after Lillie Newson had died and Lora Newson had been identified as her sole heir, the Wilkes Firm "requested that Plaintiff Newson and Eddie Newson execute a contingency fee contract in connection with the Newson Lawsuit." (Id. ¶ 47.) Like the Wilkes Firm's agreement with Howard, the terms of the Wilkes Firm's fee agreement with Newson included a forty percent contingency fee on any gross recovery. (Id.) In August 2006, the Wilkes Firm negotiated with the nursing home's insurance carrier to settle all of Newson's claims against them. (Id. ¶ 48.) The Wilkes Firm collected forty percent of the gross settlement in fees. (Id.)

In the Second Amended Class Action Complaint, Howard and Newson, on behalf of themselves and all similarly situated persons, bring eight claims against the Wilkes Firm and the individual Defendants, J. Wilkes and T. McHugh. (D.E. 177.) Count I claims that Defendants violated the Tennessee Medical Malpractice Act's fee cap ("TMMA fee cap"), Tenn. Code Ann. ¶ 29-26-120, by contracting for, charging, and collecting contingency fees in excess of 33 1/3% of the gross recoveries of Plaintiffs and the absent class members and by failing to ask the trial court to limit its fees to one third. In Count II, Plaintiffs seek declarations, pursuant to the Tennessee

Declaratory Judgment Act, Tenn. Code Ann. ¶ 29-14-101 et. seq., that the Wilkes Firm's contingency fee agreements were unlawful, that documents which purport to waive the TMMA fee provision are unenforceable, and that the fee contracts placed certain limitations on the costs and expenses the Wilkes Firm could charge. Count III is a claim of unjust enrichment for Defendants' collection of unlawful fees and unreasonable expenses. Count IV alleges that Defendants breached fiduciary duties by contracting for, charging, and collecting unlawful contingency fees, failing to disclose the TMMA fee cap, charging unreasonable and excessive fees, and failing to request a judicial determination of a contingency at or below 33 1/3% of the gross settlement amount. Count V asks the Court to impose a constructive trust for monies Defendants obtained through unlawful contingency fees. In Count VI, Plaintiffs allege personal liability on the part of J. Wilkes and T. McHugh individually because, as sole partners and/or owners of the Wilkes Firm, they implemented the contingency fee structure and failed to supervise or train their employees. In Count VII, Plaintiffs seek punitive damages for Defendants' intentional and reckless conduct. Finally, in Count VIII,

Plaintiffs seek preliminary and permanent injunctive relief related to the TMMA fee cap.[1]

Plaintiffs now move for certification of three classes: a Fee Class, a Private Plane Class, and an Expense Class.

A. Fee Class

Plaintiffs submit the following proposed definition of a Fee Class:

> From December 7, 1999 to the present, Plaintiffs and all of [sic] similarly situated persons to whom Defendants, pursuant to the terms of an employment contract, have assessed a contingency fee in excess of 33 1/3% against their respective shares of the gross settlement proceeds paid in connection with any action that Defendants filed and/or prosecuted in a Tennessee State or Federal Court where a cause of action arising under the Tennessee Medical Malpractice Act was asserted (regardless of the label used to identify the cause of action).

(Pls.' Mem. in Support of Mot. for Class Certification ("Pls. Mem.") 10.) Notably, the proposed class includes not only beneficiaries who signed contingency fee agreements with the Wilkes Firm, but passive beneficiaries whose shares of the settlement proceeds were reduced by the Wilkes Firm's fee but who did not sign fee contracts with

[1] The Motion for Class Certification does not include the claim for injunctive relief (Count 8). (Pls.' Mem. in Supp. Class Cert. 5.)

the Firm and did not act as personal representatives for the underlying estates.

At the time the Motion for Class Certification was filed, the Wilkes Firm had provided documentation for sixty-two settled Tennessee cases involving medical malpractice claims in which they contracted for and charged contingency fees over 33 1/3% of the gross settlement. According to Plaintiffs, these sixty-two settlements affected at least 181 beneficiaries throughout Tennessee and other states. Plaintiffs suggest that the proposed Fee Class will be even larger, however, because at the time of filing the Wilkes Firm had not yet produced documents in twenty-five additional settled cases and had seventy Tennessee cases pending.

At least eight absent class members have signed Ratification and Waiver Agreements which purport to waive the TMMA fee provision. (See, e.g., Walker Ratification and Waiver, Exhibit 3 to D.E. 220-2.) These documents advise clients of the possible applicability of the TMMA fee provision and the existence of this lawsuit, advise clients they "may consult with separate counsel" before signing, and indicate that the client agrees to a fee higher than 33 1/3% even if the TMMA fee provision applies. (See Defs.' Resp. Ex. 8.)

B. Private Plane Class

Plaintiffs propose the following definition of the Private Plane Class:

> From December 7, 1999 to the present, Plaintiffs and all of [sic] similarly situated persons to whom Defendants, pursuant to the terms of a contingency fee contract requiring the payment of "travel expenses and other related out-of-pocket expenses," have deducted dollar amounts for the use of the Wilkes Firm's private planes from their respective shares of the gross settlement proceeds paid in connection with any action that Defendants filed and/or prosecuted in a Tennessee State or Federal Court.

(Pls.' Mem. 11.) Of the sixty-two cases produced at the time the Motion for Class Certification was filed, twenty cases[2] involved charges for use of the Wilkes Firm's private jet. (Pls.' Mem. 14.) According to Plaintiffs, at least sixty-eight heirs were affected by these private plane charges. (Id.)

Plaintiffs argue that the contingency fee contracts in the underlying lawsuits permitted the Wilkes Firm to charge Plaintiffs and proposed class members "travel expenses and other related out-of-pocket expenses" but did not permit charging the non-out-of-pocket expenses associated with using a privately owned aircraft. (Pls.' Mem. 14.)

[2] Pls.' Mem. 15 n. 3 cites the 30(b)(6) Dep. at 84:3-18 for the proposition that the Wilkes Firm testified there were 23 cases involving private jet charges.

The Closing Statements for the underlying cases do not indicate that the flight expenses were for travel on a private jet. The Closing Statements also do not indicate that the Wilkes Firm actually paid any third party for the costs allegedly incurred by these flights.

C. Expense Class

The proposed Expense Class challenges the reasonableness of the private plane charges and the private investigator charges, which Plaintiffs allege were double-billed. Plaintiffs propose the following definition of the Expense Class:

> From December 7, 1999 to the present, Plaintiffs and all of [sic] similarly situated persons to whom Defendants have charged and collected excessive and unreasonable expenses in connection with any action that Defendants filed and/or prosecuted in a Tennessee State or Federal Court.

(Pls.' Mem. 11.) According to Plaintiffs, thirty-eight of the sixty-two produced cases involved charges for a private investigator. Plaintiffs state that these charges affected 129 heirs.

II. RULE 23 STANDARD

The trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23. Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981). A court may certify a

class pursuant to Rule 23 if it performs "rigorous analysis" of the Rule 23 requirements. Stout v. J.D. Byrider, 228 F.3d 709, 716 (6th Cir. 2000)(citing Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982)). The party seeking the class certification bears the burden of proof. See Falcon, 457 U.S. at 161; Senter v. Gen. Motors Corp., 532 F.2d 511, 522 (6th Cir. 1976). The Court should not inquire into the merits of the case at the class certification stage. Daffin v. Ford Motor Co., 458 F.3d 549 (6th Cir. 2006) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974)).

To warrant certification under Rule 23, a class must meet the requirements of Rule 23(a) and must fall within at least one of the subcategories of Rule 23(b). Rule 23(a) requires that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Plaintiffs seek to certify the Fee Class under Rules 23(b)(2) and 23(b)(3), the Private Plane Class under Rules

23(b)(2) and 23(b)(3), and the Expense Class under Rule 23(b)(3) only.

A class may be certified under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). A class may be certified under Rule 23(b)(3) where common questions of law or fact predominate over questions affecting individual members and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

III. ANALYSIS

For the reasons set forth below, the Court GRANTS Plaintiffs' motion to certify a Fee Class pursuant to Rule 23(b)(3) and DENIES Plaintiffs' motion to certify a Fee Class pursuant to 23(b)(2); DENIES Plaintiffs' motion to certify a Private Plane Class; and DENIES Plaintiffs' motion to certify an Expense Class.

A. Preliminary Issues

Before addressing each proposed class, the Court addresses two issues common to all three classes: (a) whether the record is sufficient to certify a class action

against the individual Defendants and (b) whether the passive beneficiaries – beneficiaries who did not sign contingency fee agreements with the Wilkes Firm but whose shares of the settlements were reduced by the Wilkes Firm's fees – may be members of any of the proposed classes.

1. Individual Defendants

Plaintiffs' Second Amended Class Action Complaint alleges that the individual Defendants are personally liable to Howard, Newson, and the absent class members because J. Wilkes and T. McHugh implemented the contingency fee practice and failed to supervise and train the Wilkes Firm employees. In their Motion for Class Certification, Plaintiffs ask the Court to certify a class action against both the Wilkes Firm and the individual Defendants.

The individual Defendants argue that Plaintiffs have not presented any factual support for their class allegations against J. Wilkes and T. McHugh. Specifically, the individual Defendants point out that both Howard and Newson testified that they had never met or spoken to the individual Defendants and neither had knowledge that the individual Defendants implemented or controlled the fee agreements or failed to adequately supervise firm employees. The individual Defendants also point to the following interrogatory response to show that the current

record does not permit the rigorous analysis required by Rule 23:

> Plaintiff does not allege that Jim Wilkes participated in each and every case in Tennessee that is included in the Class definition. Indeed, Plaintiff and Defendants have agreed to postpone the deposition of Jim Wilkes and Tim McHugh until after the Court's certification decision because the questions that would be posed to them would be directed to the merits of the allegations against them, rather than to the issue of Class Certification.

(Resp. of Defs.' James L. Wilkes, II, and Timothy C. McHugh to Pls.' Mot. for Class Certification 6 (quoting Interrog. 2.).)

Maintainability of a class action "may be determined by the court on the basis of the pleadings, if sufficient facts are set forth . . . ." In re Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996). "Mere repetition of the language of Rule 23(a)," however, is not sufficient. Id.

The Court concludes that the specific factual allegations in Plaintiffs' complaint are sufficient to establish that a class may be certified against the individual Defendants. The complaint alleges that J. Wilkes and T. McHugh, as owners and partners of the Firm, "generally controlled the policies and practices" of the Firm and were "directly and personally responsible for the determination and implementation of the firm's contingency

fee pricing structure and/or practices." (Compl. ¶ 103.) The complaint further alleges that the individual Defendants "directly controlled and supervised" the attorney employees of the Firm with respect to the contingency fees, and approved all settlement agreements." (Compl. ¶ 104.) In light of these detailed factual allegations, the Court concludes that a class may be certified against the individual Defendants on the present record.

2. Class Definitions - Passive Beneficiaries

Plaintiffs' proposed class definitions each include passive beneficiaries - individuals who did not sign contingency fee contracts with the Wilkes Firm but whose shares of the gross settlements in the underlying nursing home cases were reduced by the Wilkes Firm's fees and/or expenses. Defendants argue that any certified class should be limited to individuals who signed fee agreements with the Firm. The Court agrees with Defendants.

Plaintiffs' proposed class definitions, which include passive beneficiaries, do not satisfy the Rule 23 requirements because the claims of the named Plaintiffs are not typical of the claims of the absent passive beneficiaries. It is the Court's burden to "define the

class and the class claims, issues, or defenses" if the Court certifies a class action. FED. R. CIV. P. 23(c)(1)(B).

The typicality requirement of Federal Rule of Civil Procedure 23(a) "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." In re Am. Med. Sys. 75 F.3d at 1082 (citations omitted). The representative party'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 if his or her claims are based on the same legal theory." Id. "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." Sprague v. Gen. Mot. Corp., 133 F.3d 388, 399 (6th Cir. 1998).

Neither Ms. Howard nor Ms. Newson, the proposed class representatives, are passive beneficiaries. Both executed contingency fee agreements with the Wilkes Firm. (See Pls. Br. 24 n.6 ("Plaintiffs both executed fee agreements with the Wilkes Firm"); Sec. Am. Class Action Compl. Ex. D (Newson contract) and Ex. B (unsigned Baker contract).) The passive beneficiaries' claims are not based on the same course of conduct and the same legal theories as Ms. Howard

and Ms. Newson's claims. As an element of the breach of fiduciary duty claim, for example, Plaintiffs must establish that the Wilkes Firm owed them a duty. A determination that the Wilkes Firm owed fiduciary duties to Ms. Howard and Ms. Newson, as clients, because they signed contingency fee agreements with the firm, would also be a determination that the Wilkes Firm owed fiduciary duties to absent class members who signed contingency agreements with the Firm. Such a determination, however, would not necessarily establish that the Wilkes Firm owed the same fiduciary duties to passive beneficiaries. Similarly, a determination that the beneficiaries who signed fee agreements have a private cause of action for damages under the TMMA does not establish that passive beneficiaries, who are not parties to the contingency agreements, have a private cause of action under the TMMA. Likewise, if it is proven that the Wilkes Firm breached its contingency fee agreement with Ms. Newson by charging her for travel on their private aircraft, this would not be dispositive of whether passive beneficiaries were entitled to damages for breach of agreements to which they were not parties. In light of the differences in proof required to establish the claims of the passive beneficiaries and the claims of the named Plaintiffs, the Court cannot conclude that the claims

of the named Plaintiffs are typical of the claims of the absent passive beneficiaries.[3]

Plaintiffs argue that the Wilkes Firm should be barred by the doctrine of judicial estoppel from arguing that passive beneficiaries were not its clients. Plaintiffs point out that, in a previous filing with this Court, the Wilkes Firm stated that it "represented the interests of the seven other beneficiaries of the Baker case" and represented to the Court that the Rules of Professional Responsibility required them to consult with "each and every beneficiary" before releasing settlement documents to Plaintiffs' counsel. (Pls.' Mem. 24 n.6 (citing Defs.' Mem. in Supp. of Mot. for Stay of Disc. and for a Protective Order (D.E. 98-2) 8-9).) Whether or not the passive beneficiaries were clients of the Wilkes Firm, they

[3] There is also an issue as to whether the proposed class representatives, Ms. Howard and Ms. Newson, could adequately represent the interest of the absent passive beneficiaries. See Fed. R. Civ. P. 23(a)(4). Passive beneficiaries who are dissatisfied with the legal fees or expenses charged to the estate may decide to pursue claims against the personal representatives of the estate. (See Pls.' Mem. 24 n.6 (citing Defs.' Ans. ¶ 77)("[T]he Wilkes Firm erroneously suggests that . . . if the passive beneficiaries are dissatisfied with the legal fees, they must sue the representative who hired the Wilkes Firm.").)

As the personal representative for the Baker estate, Ms. Howard's interests are potentially adverse to the interests of passive beneficiaries because of the possible litigation between passive beneficiaries and personal estate representatives. Although Ms. Newson was not the personal representative for the Newson Estate, she is unlike the passive beneficiaries because she signed a contingency fee agreement with the Wilkes Firm. Her interests are therefore more aligned with personal representatives, who also signed the contingency fee agreements, than with the passive beneficiaries.

cannot be members of the proposed classes because Plaintiffs have not established that the typicality requirement of Rule 23(a)(3) is satisfied with respect to passive beneficiaries. Accordingly, the Court need not decide whether the doctrine of judicial estoppel bars the Wilkes Firm from arguing that passive beneficiaries were not their clients.

The Court concludes that, with respect to the inclusion of passive beneficiaries in the class definition, none of the proposed classes may be certified under Rule 23. In the following sections, the Court addresses whether each proposed class meets the requirements of Rule 23 if passive beneficiaries are excluded from the class definitions.

B. Fee Class

The Court first considers whether a Fee Class which does not include passive beneficiaries satisfies the requirements of Rule 23. The Court begins its analysis with the four requirements of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of the representation.

1. Numerosity

The first requirement of Rule 23(a) is that "the class is so numerous that joinder of all members is

impracticable." Fed. R. Civ. P. 23(a)(1). To meet the numerosity requirement, Plaintiffs "need not show the precise number of members in the class" as long as the number is not "purely speculative." Isabel v. Velsicol Chemical Corp., 2006 WL 1745053, at *3 (W.D. Tenn. June 20, 2006). "Generally, the numerosity requirement is fulfilled when the number of class members exceeds forty." Id. at *4 (citing Stewart v. Abraham, 275 F.3d 220 (3d Cir. 2001).)

Based on the documents produced at the time this Motion was filed, the Fee Class could include the contracting (non-passive) beneficiaries in at least sixty-two cases. For many of these cases, there will be only one class member - the personal representative for the underlying estate who hired the Wilkes Firm. In other cases, there may be multiple class members for a single case. In the Newson case, for example, Eddie Newson was the personal representative, but Ms. Newson is also a contracting beneficiary and proper class member because she signed a contingency fee contract with the Wilkes Firm.

Defendants attempt to decrease the size of the class by excluding cases in which state and local courts approved the settlements. As the Court explained at the hearing on this motion and in two previous orders on Defendants' motions to dismiss, the proceedings before the probate

courts were not litigation on the merits of Plaintiffs' TMMA and fiduciary duty claims. (See Order Denying Defendants' Motions to Dismiss (D.E. 112) 24-25 (concluding that previous proceedings did not bar litigation of the TMMA fee provision issue because prior proceedings "did not conclude Plaintiff's rights against Defendants," "the issue of compliance with the statutory fee cap was not discussed or referenced in any of the proceedings," and "the present parties were not adverse in the prior proceeding"); Order Granting in Part and Denying in Part Defendants' Second Motions to Dismiss (D.E. 178) 15 (reiterating non-preclusive affect of previous proceedings).) The prior proceedings litigated the rights of the estate, not the rights of Plaintiffs. No one was present at the hearings to contest the contingency fees or argue that the TMMA fee provision should apply. Accordingly, the numerosity inquiry is unaffected by the fact that other courts have approved the settlement agreements in the underlying cases.

Defendants also attempt to decrease the class size by excluding individuals who signed Ratification and Waiver Agreements. The Court agrees that individuals who signed Ratification Agreements must be excluded from the Fee Class because, as explained below (see ii. 23(b)(3) Certification: Predominance and Superiority), the

individual issues involved in determining whether the Agreements were signed freely and knowingly, and whether these Agreements are against public policy, will predominate over issues common to the class. The exclusion of these potential class members reduces the expected class size by eight. Accordingly, there are at least fifty-four potential class members in the Fee Class (one for each of the sixty-four cases minus the eight who signed Ratification and Waiver Agreements).

A class of greater than fifty-four members weighs in favor of concluding that joinder is impracticable. Unlike classes of several hundred potential members, however, this is not a class for which the "sheer number of potential litigants" is sufficient to meet the numerosity requirement. Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565, 570 (6th Cir. 2004) (where class size is more than several hundred, numerosity requirement may be met by size alone). The Court therefore considers the specific facts of this case to determine whether joinder will be impracticable. Gen. Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.").

In addition to the size of the class, courts addressing the impracticability of joinder consider the geographic dispersion of the class members, the ease with which class members can be identified, judicial efficiency and the avoidance of multiplicity of actions, the size of individual claims, the financial resources of class members and the ability of claimants to institute individual lawsuits. Randleman v. Fid. Nat. Title Ins. Co., 2008 WL 2323771, at *5 (N.D. Ohio); Novella v. Westchester Co., 443 F. Supp. 2d 540, 546 (S.D. N.Y. 2006); Kerns v. Caterpillar, Inc., 2007 WL 2044092, at *3 (July 12, 2007 M.D. Tenn); Isabel v. Velsicol Chem. Corp., 2006 WL 1745053, at *4 (June 20, 2006 W.D. Tenn.). The potential class members are geographically dispersed throughout Tennessee. (See Compl. ¶ 77 and Collective Exhibits A-1 to A-20.) Judicial efficiency counsels in favor of certification because it would be time-consuming and costly to try each claim separately, especially given the similarity of the fee contracts in each case.

The Wilkes Firm argues that it may be subjected to multiple lawsuits even if the class is certified because Plaintiffs may decide to pursue Tennessee Consumer Protection Act ("TCPA") claims, which cannot be brought in class actions, individually. Plaintiffs, however, have

amended their complaint to remove the TCPA claim. Cf. Alston v. Regions Bank, 07-2134 (W.D. Tenn. July 31, 2008) (D.E. 105 p. 20) (finding that Plaintiff failed to show that proposed class members would not bring individual actions even if the class was certified because the complaint alleges a TCPA claim). Plaintiffs represent to the Court that none of the proposed class members have filed individual complaints against Defendants. On the present record, therefore, Plaintiffs have shown that a class action will avoid a multiplicity of actions.

The Wilkes Firm correctly points out that some of the factors considered in the impracticability of joinder analysis weigh in their favor. The ability of class members to initiate individual lawsuits, for example, is evidenced by their retention of the Wilkes Firm to represent them in the underlying litigation. Likewise, while Plaintiffs characterize the class members as "unsophisticated," the Court has seen no evidence that these class members are not sophisticated enough to hire counsel to represent them. The fact that potential damages awards are not so small that individual lawsuits would be impractical also weighs in Defendants' favor.

On balance, however, the Court concludes that the number of class members (at least fifty-four), their

geographic dispersion throughout Tennessee, and concerns about judicial efficiency weigh in favor of finding that the numerosity requirement has been satisfied and that joinder is impracticable.

2. Commonality

To satisfy the commonality requirement of Rule 23(a)(2), Plaintiffs need only show one common issue of law or fact, Bittinger v. Techumseh Prods. Co., 123 F.3d 877, 884 (6th Cir. 1997), but the common issue must be one that advances the litigation (Sprague v. Gen. Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998).). This requirement is generally met where common questions involve the "standardized conduct of the Defendants toward members of the proposed class." Franklin v. City of Chicago, 102 F.R.D. 944, 949 (N.D. Ill. 1984). In actions brought under Rule 23(b)(3) an initial determination of commonality under Rule 23(a)(2) is superfluous and redundant. 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1763 n.11 (3d ed. 2005). Accordingly, the Court will discuss commonality in the discussion of predominance under Rule 23(b)(3).

3. Typicality

Rule 23(a)(3) requires that the claims of Plaintiffs' representative parties be "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3).

The named Plaintiffs, like the class members, allege that Defendants contracted for and collected fees in excess of 33 1/3% in cases involving medical malpractice claims, in violation of the TMMA and in breach of their fiduciary duties. These claims are typical of the Fee Class members' claims. Defendants argue that Plaintiffs do not allege a common practice typical of the class because the fee calculation varied depending on the unique circumstances of each case. (Defs.' Mem. 22.) The variation in the percentage of the fee and in the actual dollar amount of the fee, however, are damages issues. The Sixth Circuit has repeatedly held that the need to make individualized damages determinations does not preclude a finding of typicality. See In re Scrap Metal Antitrust Litig., 527 F.3d 517, 535 (6th Cir. 2008); Olden v. LaFarge Corp., 383 F.3d 495, 508 (6th Cir. 2004). The named Plaintiffs and the absent class members assert claims under the same legal theories, based on the same allegedly unlawful practice. Accordingly, the Court finds the typicality requirement satisfied.

4. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Sixth Circuit has identified "two criteria for determining whether the representation of the class will be adequate: 1) the representative must have common interests with unnamed members of the class and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." Senter, 532 F.2d at 524-25 (citations omitted). The "common interests" criterion "essentially requires that there be no antagonism of interest or conflict of interest between the representative Plaintiffs and the other members of the class they seek to represent." Coleman v. Gen. Motors Acceptance Corp., 220 F.R.D. 64, 80 (M.D. Tenn. 2004).

Defendants argue that Plaintiffs are not adequate class representatives for the Fee Class because they are neither in control of the litigation nor familiar with the claims. (Defs.' Mem. 24.) The Court finds, however, that the named Plaintiffs have no "antagonism of interest" with the absent class members, and that they will fairly and adequate represent the interests of the class.

Defendants argue that Howard and Newson are merely "lending their names" to the action. (Defs.' Mem. 25.) In support of their position, Defendants point to deposition testimony of the named class representatives which, according to Defendants, show that the representatives lack familiarity with "fundamental aspects of the case" and have no personal knowledge of the facts, other than what their lawyers told them. (Defs.' Mem. 25-28 (citing Newson Dep. 55, 97-98, 158-160; Howard Dep. Vol. II 27-30, 32-33, 58, 63, 67-68, 80-81, 94-95, 97, 103, 104).)

"[I]t is inappropriate to attack the adequacy of a class representative simply based on the representative's ignorance of the underlying facts." Rankin v. Rots, 220 F.R.D. 511, 521 (E.D. Mich. 2004). Moreover, the Newson and Howard depositions demonstrate that the named Plaintiffs understand the nature of the claims and their obligations as class representatives. Newson, for example, testified that her lawyers were not permitted to charge more than a 33 1/3% fee in the Lily Newson case because it was a medical malpractice case. (Newson Dep. 90-92.) Ms. Howard testified that her lawyers had an obligation to look out for her. (Howard Dep. Vol. II 56.) She also testified that her mother's case against the nursing home was for medical malpractice because her mother suffered bed sores,

malnutrition, and a urinary tract infection a result of people at the nursing home not doing their jobs. (Id. at 56-57.) Ms. Howard also demonstrated that she understood the nature of the fee claim when she stated: "Yeah. But they over charged me 40 percent when they should have charged a third. They should give it back." (Id. at 98.) Plaintiffs' reliance on their attorneys for information and advice about their case does not make them inadequate representatives.

Defendants also argue that Howard and Newson are inadequate class representatives because they lack standing to pursue injunctive or declaratory relief. Plaintiffs are not seeking class certification on the injunctive relief claim. (Pls.' Mem. 51.) Defendants have provided no legal or factual support for their assertion that the named Plaintiffs lack standing to pursue declaratory relief. The Court, therefore, does not address Defendants' standing argument.

Finally, it appears to the Court that the named Plaintiffs will "vigorously prosecute the interests of the class through qualified counsel." See Senter, 532 F.2d at 524-25. Howard and Newson have maintained their involvement with this case throughout. They testified that they are willing to serve as representatives and that they

understand their responsibilities in this regard. Plaintiffs' attorneys, William Burns and Frank Watson, III, have served as class counsel in previous cases, have served as counsel in this case, and are qualified to vigorously prosecute the interests of the Fee Class. (See Pls.' Mem. 52-54 (detailing experience of proposed class counsel).)

ii. 23(b)(3) Certification: Predominance & Superiority

A class may be certified under Rule 23(b)(3) if the requirements of Rule 23(a) are satisfied and the court finds that questions common to the class "predominate over any questions affecting only individual members" and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

> Factors relevant to the predominance and superiority findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Id.

To meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001) (quoting Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000) (internal quotation marks omitted)). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Id. (quoting Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 623 (1997)). "The predominance requirement is met if [the] common question is at the heart of the litigation." Powers v. Hamilton Co. Public Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007).

In this case, common questions of law and fact predominate over those affecting only individual members. The claims of each class member depend upon the common legal question of whether the TMMA applies to the settlement of multiple theory cases – cases in which both medical malpractice and other claims are alleged. This common question is "at the heart of the litigation," and a class action will ensure that the issue is decided

uniformly and consistently across class members. With respect to the fiduciary duty claim, the issue of whether the Wilkes Firm had a duty to disclose the TMMA fee provision to its clients is another central common question.

The factors identified in Rule 23(b)(3) also weigh in favor of finding that common issues predominate and that a class action is superior to other available methods of resolving the controversy. There is no evidence in the record that individual class members are interested in individually controlling the prosecution of their claims. Plaintiffs assert that twenty-five absent class members have retained Plaintiffs' counsel for purposes of the class action and that none of the absent potential class members have filed separate lawsuits against Defendants. (Pls.' Mem. 57.) It is desirable to concentrate the litigation in this forum because it will avoid the possibility of inconsistent adjudications of common legal questions. Furthermore, the Wilkes Firm has a Tennessee office in this jurisdiction. With respect to manageability, the Court can foresee no exceptional difficulties with class member notification, calculation of individual damage awards, or other issues which would make the class action

unmanageable. See Brink v. First Credit Res., 185 F.R.D. 567, 572 (D. Ariz. 1999).

Defendants argue that individual issues will predominate over common issues because the following four questions require individualized inquiries and are not susceptible to generalized proof: (1) whether a case arises under the TMMA; (2) whether each class member ratified the fee agreements (by signing a Ratification Agreement or otherwise); (3) whether lower courts approved the fees; and (4) whether the statute of limitations bars each individual claim. The Court addresses each of these issues in turn.

1. Whether a Case Arises Under the TMMA

Defendants argue that in order to determine whether the TMMA applies to each underlying case, the Court must "mini-try" each case to determine whether it was a "medical malpractice action." (Defs.' Mem. 37.) The Court disagrees and concludes that determining whether the TMMA applies to each of the underlying cases will be a relatively minor task. Most of the underlying complaints include a cause of action labeled "Negligence Pursuant to the Tennessee Medical Malpractice Act" (see, e.g., Allen Complaint (D.E. 220 Ex. A-1)), "Negligence as Defined by the Tennessee Medical Malpractice Act" (see, e.g., Hall Complaint (D.E. 220 Ex. A-12)), or otherwise explicitly

reference the TMMA or medical malpractice. Determining whether such complaints include claims for medical malpractice will not require extensive individualized inquiry. Where the Wilkes Firm did not label medical malpractice or TMMA claims in the underlying complaint, Defendants are correct that the Court will be required to determine whether the case arose under the TMMA. The Court, however, does not anticipate that this determination will be so onerous as to become a predominating issue in the case. An individualized review of each case is not required in order to determine whether the TMMA applies to the settlement of multiple theory cases. This central, common issue of law predominates over the individualized issues in the case. If the Court determines that an individualized inquiry is necessary to calculate damages, it can bifurcate the proceedings on the damages issue.

2. Ratification

Citing Newton v. Cox, Defendants argue that because contracts that violate the TMMA fee provision are voidable rather than void, the Court must determine whether each individual client "ratified" the contingency fee agreement. The Court agrees that it may be required to determine whether potential class members knowingly waived the protections of the TMMA fee provision. Defendants have

submitted evidence that eight potential class members signed Ratification and Waiver Agreements. These documents advise clients of the possible applicability of the TMMA fee provision and the existence of this lawsuit and advise clients they "may consult with separate counsel" before signing. The Ratification Agreements also provide that the attorneys are entitled to a higher fee even if the TMMA fee provision would otherwise cap the fee at 33 1/3%. (See Defs.' Resp. Ex. 8.)

The Court makes no finding as to the validity of these agreements at this time. The Court notes, however, that whether the Agreements were signed freely and knowingly, and other issues relevant to the Agreements' validity are likely to require individualized proof. What each individual knew and how each individual was advised at the time the Ratification Agreements were signed are likely to be highly individualized. Furthermore, Plaintiffs' argument that these waivers are against public policy will require determination of issues not common to the claims of Plaintiffs who did not sign Ratification Agreements.[4]

[4] The Court cannot certify a subclass of individuals who signed Ratification Agreements because such a subclass could not independently meet the requirements of Rule 23. A Ratification Agreement Subclass would not meet the numerosity requirement of Rule 23(a)(1) because only eight potential members have been identified and joinder would not be impracticable. Furthermore, the Court cannot engaged in the Rule 23(a)(4) adequacy of representation analysis because Plaintiffs have

Accordingly, the Court concludes that individuals who have signed Ratification and Waiver Agreements are not included in the Fee Class.

Defendants argue, however, that the ratification issue is not limited to clients who signed Ratification Agreements because some clients may have ratified the contingency fee agreements by silence. According to Defendants, clients may have ratified by silence if they were told of the TMMA fee provision and failed to timely object to the higher contingency fee. (Defs.' Mem. 39.) Defendants assert, therefore, that "in order to determine whether the respective personal representatives were advised as to the TMMA fee cap limitations prior to settlement, each personal representative would have to be interviewed as to his knowledge of the TMMA fee cap, and when the knowledge was obtained." (Id. at 40.) The Court is not persuaded that individual ratification issues will predominate over common issues for clients who have not signed Ratification Agreements. The Court makes no determination as to the merits of Defendants' "silent ratification" defense at this stage. Instead, the Court concludes that any individual inquiries that may be

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not identified a class representative for a Ratification Agreement Subclass.

required in specific cases will not outweigh the liability issues common to the entire class. See In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 138 (2nd Cir. 2001)(internal quotation marks and citations omitted), overruled on other grounds by Teamsters Local, 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 203 (2nd Cir. 2008) ("[A]s long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification under Rule 23(b)(3).").

3. Court approval

Defendants argue that "this Court will be asked to review the orders entered in each case and to determine whether this Court finds that the fees were approved in each case . . . ." (Defs.' Mem. 40.) The Court disagrees. As explained in the numerosity section, the prior proceedings in other courts litigated the rights of the estate, not the rights of Plaintiffs. No one was present at the hearings to contest the contingency fees or argue that the TMMA fee provision should apply. Whether the fees were approved by the probate court, therefore, is a not an individualized inquiry which will predominate in this case.

4. Statute of Limitations

Finally, the Wilkes Firm argues that individual issues will predominate because the application of the appropriate statute of limitations will require a case by case analysis. Plaintiffs argue that the statute of limitations was tolled under the doctrine of fraudulent concealment because Defendants failed to disclose the TMMA fee provision. (Compl. ¶ 98.) Whether the doctrine of fraudulent concealment will operate to toll the statute of limitations on Plaintiffs' claims is another issue common to the entire class. Although the statute of limitations defense may involve some individual issues, "potential individual questions raised by the application of the limitations defense do not preclude a finding that the common issues of fact and law predominate. Tomlison v. Kroger Co., 2007 WL 1026349, at *6 (S.D. Ohio March 30, 2007) (citing 1 Newberg § 4.26, at 4-105-06).) "While the necessity for individualized statute-of-limitations determinations weighs against class certification under Rule 23(b)(3), the presence of such issues does not automatically undermine the predominance factor. Id. (citing Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000).

5. 23(b)(3) Conclusion

The Wilkes Firm is correct that some issues will require individualized proof. On balance, however, the Court concludes that the common issues predominate and that a class action is superior to other possible methods for fairly and efficiently adjudicating Plaintiffs' claims and the claims of the proposed class members. The centrality of the common legal questions, the similarly in proof required to prove liability, and the importance of resolving the common legal issues uniformly counsel in favor of certifying the limited Fee Class. As discovery progresses and the issues to be tried become clearer, the Court will exercise its authority under Rule 23(d) to control the conduct of the action. At this stage, the Court finds that the following Fee Class meets the requirements of Fed. R. Civ. P. 23(b)(3) and is hereby CERTIFIED as a class:

> Plaintiffs and similarly situated individuals who signed a contingency fee agreement with Defendants in connection with any action Defendants filed and/or prosecuted in a Tennessee State or Federal Court, from December 7, 1999 to the present, in which a medical malpractice, medical negligence, or claim under the TMMA was asserted and in connection with which Defendants assessed a contingency fee in excess of 33 1/3% of the gross settlement proceeds.
>
> Excluded from this class are passive beneficiaries whose shares of gross settlement

> proceeds were reduced by Defendants' contingency fees but who did not sign contingency fee agreements with Defendants. Also excluded from the class are persons who signed Ratification and Waiver Agreements with Defendants.

iii. 23(b)(2) Certification

Plaintiffs also move the Court to certify the Fee Class under both Rule 23(b)(3) and 23(b)(2). Plaintiffs' Motion to certify the Fee Class under Rule 23(b)(2) is DENIED. Plaintiffs seek certification of the Fee Class under Rule 23(b)(2) based on their claim for "a declaration that the Wilkes Firm's contingency fees concerning the Class Members' underlying cases violate the TMMA fee cap and that any waiver of the TMMA fee provision is unlawful." (Pls.' Mem. 64 (citing Compl. ¶¶ 90, 92).)

In support of their claim for dual certification of the Fee Class, Plaintiffs rely heavily on Olden v. LaFarge Corp., 383 F.3d 495, 507 (6th Cir. 2004), in which the Sixth Circuit affirmed the dual certification of a plaintiff class under Rules 23(b)(2) and 23(b)(3). In Olden, property owners sued the Defendant corporation for personal and property damage caused by Defendant's emission of toxic pollution. Id. at 497. Plaintiffs sought both money damages and an injunction requiring Defendant to stop the polluting activity. Id. at 497-98.

The present case is different from Olden in two important respects. First, Plaintiffs seek 23(b)(2) certification of the Fee Class based on their claim for declaratory relief, rather than injunctive, relief. The declaratory judgment claim essentially asks the Court to answer the same legal question presented by the Fee Class claim for money damages – whether the Wilkes Firm's contingency fees in the underlying cases violate the TMMA. As the Fifth Circuit noted in Bolin v. Sears, Roebuck & Co., "[t]he mere recitation of a request for declaratory relief cannot transform damages claims into a Rule 23(b)(2) class action." 231 F.3d 970, 978 (5th Cir. 2000).

Second, Plaintiffs are unlikely to personally benefit from declaratory relief because they are not victims of an ongoing harm. In Olden, the property owners would continue to suffer damages if Defendant were not enjoined from its polluting behavior. Olden, 383 F.3d at 511 (finding injunctive relief more "critical" than in other cases because the plaintiffs were "currently being irreparably harmed"). In contrast, the Plaintiffs in this case are unlikely to suffer additional or ongoing damages if the Court does not declare the Wilkes Firm's fee practices illegal.

For these reasons, the Court DENIES Plaintiffs' motion for dual certification of the Fee Class and declines to certify the class under Rule 23(b)(2).

C. Private Plane Class

Plaintiffs ask the Court to certify the following class under both Rule 23(b)(2) and 23(b)(3):

> From December 7, 1999 to the present, Plaintiffs and all of [sic] similarly situated persons to whom Defendants, pursuant to the terms of a contingency fee contract requiring the payment of "travel expenses and other related out-of-pocket expenses," have deducted dollar amounts for the use of the Wilkes Firm's private planes from their respective shares of the gross settlement proceeds paid in connection with any action that Defendants filed and/or prosecuted in a Tennessee State or Federal Court.

(Pls.' Mem. 11.)

In their Memorandum in Support of Motion for Class Certification, Plaintiffs "respectfully request the ability to amend their Complaint to the extent deemed necessary by the Court in order to assert the Private Plane Class." (Pls.' Mem. 25.) The Court's Rule 23 analysis, however, requires the Court to know which claim or claims are alleged by the proposed class. The Court cannot undertake the rigorous analysis required by Rule 23 without knowing Plaintiffs' theory of recovery. Plaintiffs do not include a proposed amendment with their Motion nor do they indicate

in the Memorandum how they intend to amend the complaint if granted leave to do so.[5]

In the absence of any clear statement as to the claims or theories of recovery of the proposed private plane class, the Court cannot perform the rigorous analysis required by Rule 23. The Court cannot, for example, determine whether common issues will predominate over individual issues if the Court does not know which elements Plaintiffs will be required to prove. See Reeb v. Ohio Dept. of Rehab. and Corr., 435 F.3d 639, 644 (6th Cir. 2006) (district court could not "adequately examine" class certification issue without knowing the precise nature of the various claims).

It is Plaintiffs burden to show that the requirements of Rule 23 are satisfied. The Court concludes that Plaintiffs have failed to meet their burden to show that the requirements of Rule 23 are satisfied with respect to the Private Plane Class.

[5] It is not clear to the Court whether the Private Plane Class would assert breach of fiduciary duty claims, breach of contract claims, or some other claim or claims. In its Motion for Class Certification, Plaintiffs argue that the private plane charges were "in violation of the fee contracts because they were not out-of-pocket expenses" indicating that the claims may be for breach of contract. (Mot. 2.) In their Second Amended Complaint, Plaintiffs allege that Defendants' conduct with respect to the private plane charges constituted a "gross breach of fiduciary duty." (Compl. ¶ 65.)

D. Expense Class

The Court declines to certify an expense class because individual questions predominate over any common questions. To determine who is a member of the class, the Court would need to determine which fees and expenses, if any, were "unreasonable" or "excessive." This determination would require a fact-intensive case-by-case analysis. A determination of membership in the class would essentially be determinative of liability, as Defendants make no argument that they were permitted to charge "unreasonable" or "excessive" fees. Whether expenses are reasonable is unique to the particular circumstances of each case. Accordingly, Plaintiffs' motion to certify an Expense Class is DENIED.

IV. CONCLUSION

For the reasons discussed above, the Court finds that Plaintiffs have satisfied the requirements of Rules 23(a) and 23(b)(3) with respect to a Fee Class and, therefore, GRANTS Plaintiffs' Motion to Certify a Fee Class. The class is defined as follows:

> Plaintiffs and similarly situated individuals who signed a contingency fee agreement with Defendants in connection with any action Defendants filed and/or prosecuted in a Tennessee State or Federal Court, from December 7, 1999 to the present, in which a medical malpractice, medical negligence, or claim under the TMMA was

> asserted and in connection with which Defendants assessed a contingency fee in excess of 33 1/3% of the gross settlement proceeds.
>
> Excluded from this class are passive beneficiaries whose shares of gross settlement proceeds were reduced by Defendants' contingency fees but who did not sign contingency fee agreements with Defendants. Also excluded from the class are persons who signed Ratification and Waiver Agreements with Defendants.

With respect to the proposed Private Plane Class and the proposed Expense Class, the Court finds that Plaintiffs have failed to satisfy the requirements of Rules 23(a) and 23(b) and, therefore, DENIES Plaintiffs' Motion to Certify a Private Plane Class and DENIES Plaintiffs' Motion to Certify an Expense Class.

Plaintiffs' counsel is ORDERED to designate in writing the individual or individuals who seek appointment as class counsel, in accordance with Federal Rule of Civil Procedure 12(g), by May 8, 2009. Within fourteen days of the date of this Order, the parties shall file a joint proposed notice pursuant to Federal Rule of Civil Procedure 23(c)(2)(B) and a list of all persons who meet the class definition, including name, telephone number, and last known address.

So ORDERED this 15th day of April, 2009.

/s/ JON P. McCALLA
UNITED STATES DISTRICT JUDGE