STATE OF MISSOURI
CIRCUIT COURT, TWENTY-SECOND JUDICIAL CIRCUIT
City of Saint Louis

EDWARD DECRISTOFARO,
Plaintiff,
v.
JOHN L. DUNHAM[1], *et al.*,
Defendants,

Cause No. 22064-00265	Division 31	June 30, 2009

ORDER AND JUDGMENT DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND CERTIFICATION OF PLAINTIFF AS CLASS REPRESENTATIVE AND SETTING DATE FOR STATUS CONFERENCE

Summary

Plaintiff purchased 100 shares of stock in the May Department Stores Company ("May") on January 24, 2005. On February 28, 2005, May and Federated Department Stores Inc. ("Federated") jointly issued a press release announcing the signing of an agreement and plan of merger. The merger was completed on August 30, 2005. Plaintiff claims he was damaged by the terms of the merger: Plaintiff claims the value of his stock was not fully realized by the merger terms, and instead the merger gave May stockholders an inadequate and unfair price, and otherwise contained provisions that damaged them. Plaintiff alleges that the Defendants, the directors of May, breached their fiduciary duty of loyalty to their stockholders, including their duty to disclose material facts to the stockholders prior to the merger, and that the directors improperly benefited from the merger. Plaintiff asks for the Court to order rescission of the merger; or, "if" rescission is impractical, then for damages. Plaintiff filed this action on his own behalf, and also asked the Court to certify the action as a class action and Plaintiff as representative of all others who owned stock in May during the period of the merger.

The Court heard the arguments of counsel on the issue of whether or not Plaintiff's motion for class certification should be granted. The primary areas of contention were whether Plaintiff should be certified as class representative; and also whether prosecution of separate actions by members of the class would create a risk of adjudications either inconsistent or that would impede the ability of members of the class who are not parties to protect their interests. The Court now has considered the pleadings, the record, the arguments of the parties and the applicable law, and has determined that Plaintiff's motion for class certification must be denied. This Court follows the principle set forth in *Dale v. DaimlerChrysler Corp.*, a Western District Missouri Court of Appeals decision cited below, that deciding questions of adequacy of a class representative requires an analysis of the particular circumstances in each case. In this case, this Court finds that Plaintiff would be subjected to certain unique defenses, involving Defendants' allegations that Plaintiff purchased stock in May to "buy a lawsuit." This Court also finds that, if Plaintiff were to be approved as class representative, those defenses would likely play a major role in the litigation. Therefore, in this case, the Court finds that Plaintiff would not be an adequate representative of the members of the proposed class; and in the same context, that Plaintiff's claims are not in common with nor typical of the claims of the other members of the class.

[1] Plaintiff's petition filed in this case was captioned "DeCristofaro v The May Department Stores Company and [the individual directors of May]. However, the action against May was dismissed by stipulation of all parties on November 16, 2006.

In deciding whether or not to certify the Plaintiff as class representative, the Court does not determine whether or not such defenses are true. Rather, based on the evidence presented at the class certification hearing, the Court considers whether it is likely that such defenses would play a major role in the litigation, which would impair Plaintiff's ability to successfully prosecute his action on behalf of all class members, and which would also impair the ability of the other members of the class to protect their own interests.

Factual and Procedural Background

Plaintiff alleges in his petition that "Plaintiff, at all times relevant hereto, was a shareholder of May. Plaintiff's shares of May were exchanged for shares of Federated pursuant to the Acquisition [agreement between May and Federated], and he was damaged thereby."

Plaintiff does not indicate either in his petition or his class certification motion when Plaintiff first became a shareholder of May. However, in his deposition, Plaintiff testified that he purchased 100 shares of May stock at $33 per share on January 24, 2005.

According to the facts pled in Plaintiff's petition, and cited by Defendants in their memorandum in opposition to Plaintiff's motion for class certification, May and Federated began discussions about a possible merger in January, 2005. After a series of proposals by Federated to May's directors were rejected, Federated made an offer which was accepted. On February 27, 2005, the companies entered into and announced the merger agreement. In July, 2005, in separate meetings, the shareholders of May and of Federated voted to approve the merger, which was then completed on August 30, 2005.

Plaintiff filed his first lawsuit challenging the merger "immediately" after the announcement of the merger. See Plaintiff's motion for class certification, p. 6, although Plaintiff does not specifically state the date when he filed his first lawsuit. Defendants contended in the hearing on Plaintiff's motion that Plaintiff filed his first lawsuit "within just a few hours of the deal being announced." (T.36) Defendants reiterated this contention later in the hearing, when Defendants presented their exhibits regarding the timeline of activity, showing that May and Federated announced the merger at 8:00 a.m. on February 28, 2005; and that later that same day Plaintiff filed "the very first iteration of this lawsuit." (T.50) Later in the hearing, the Court asked Plaintiff's counsel if he had any argument to make in response to the contention that the fact that the Plaintiff filed his first lawsuit on the same day that the merger was announced was evidence of "something nefarious, to use your word." Plaintiff's response was that the circumstance of the filing later on the same day that the merger was announced was not evidence of something nefarious, but rather "that is simply the way things work," explaining that there is a short window of opportunity for shareholders to try to stop a merger when they think it is a bad deal. (T.83)

Plaintiff's counsel went on to explain that Defendants removed Plaintiff's first case to federal court; and that by the time the federal court remanded the case back to this court, there were only two weeks left to stop the merger; and that Plaintiff decided that was not enough time to complete discovery and have an evidentiary hearing for an injunction to stop the merger, so Plaintiff dropped his effort to block the merger. (T. 84)

Consequently, the merger was completed as indicated above, on August 30, 2005.

On January 11, 2006, Plaintiff filed his petition in this case alleging breach of fiduciary duty by the various Defendants, all of whom were members of the Board of Directors of May, in their actions involved in the merger with Federated.

On November 16, 2006, Defendants' Motion to Dismiss was heard. The May Department Stores Company was dismissed by stipulation of the parties, with prejudice, by order of Judge Lisa Van Amburg. The remaining Defendants were granted time to file a reply brief on the motion to dismiss the remaining defendants. Judge Van Amburg's order indicated that the motion was to be deemed submitted as of December 1, 2006.

On June 27, 2007, Judge Van Amburg denied the motion to dismiss as to the Defendant directors, determining that the allegations made by Plaintiff in his petitition were sufficient to plead the elements necessary to maintain Plaintiff's action.[2]

The case was later assigned to this Court. The parties conducted a great deal of discovery and appeared for conferences and motions regarding discovery issues. Plaintiff's motion for class certification was set for a hearing. The parties filed memoranda of law in support of their respective positions and statements of facts in accordance with the requirements of Mo.S.Ct. Rule 52.8, which governs class actions. At the hearing, the parties appeared by counsel and a hearing was held on the record, at which the parties presented evidence and arguments. After the hearing, Defendants filed their "Notice of Supplemental Authority in Opposition to Plaintiff's Motion for Class Certification," which was a memorandum based on a June 10, 2008, decision of the Missouri Supreme Court, in *Green v. Fred Weber, Inc.*, 254 S.W.3d 874 (Mo. 2008). In that decision, the Supreme Court remanded that case for further hearing on the issue of class certification after reversing the trial court's order which had certified the action as a class action. Plaintiff filed his response to the Defendants' memorandum; and Defendants filed their reply to Plaintiff's response. Today this Court enters its ruling on Plaintiff's Motion for Class Certification and Certification of Class Representative

Issues

Plaintiff's motion is titled "Plaintiff's Motion for Class Certification and Certification of Class Representative." There are three issues presented by Plaintiff's motion that are hotly contested by Defendants. These are: 1) whether or not Plaintiff's claims are typical of other potential members of the class; 2) whether or not Plaintiff and Plaintiff's counsel will fairly and adequately protect the interests of the class; and 3) whether or not the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Discussion

[2] A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. The Court assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo.banc 2001). No attempt is made to weigh any facts as to whether they are credible or persuasive. Instead, the petition is reviewed to see whether the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Id.*

The parties are in agreement that the law of the State of Delaware is controlling in this case, because May was incorporated under Delaware law.

Plaintiff seeks an order certifying him as representative member of a class comprising all persons who continuously owned shares of May stock between February 27, 2005 and August 30, 2005, who have been injured as a result of Defendants' alleged wrongful conduct (excluding from the class Defendants themselves, and any person, firm, trust, corporation, or other entity related to or affiliated with any of the Defendants).[3]

Mo.S.Ct. Rule 52.08 governs the Court's determination as to whether an action is to be maintained as a class action. *Green, supra* at 877. The testimony and evidence heard on the certification of a Rule 52.08 class go to the question of whether the prerequisites of a class action are met. *Reinhold v. Fee Fee Trunk Sewer, Inc.*, 664 S.W.2d 599 (Mo.App. E.D. 1984). These prerequisites are: (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. *Green, supra* at 877; *State ex rel. American Family Mutual Ins. Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003) (citing Rule 52.08(a)).

If these four prerequisites are met, the court will certify a class if the plaintiff also shows that the class falls within one of the categories set out in Rule 52.08(b).

Rule 52.08(b) states:

> "Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

---

[3] In Plaintiff's motion for class certification, he describes the class as "all persons who owned shares of [May] common stock on July 13, 2005 …" In his reply to Defendants' response to his motion, Plaintiff amended his proposed class to "all individuals who owned May stock on …February 27, 2005, and who held May stock continuously from that date through the close of the Acquisition on August 30, 2005." (Reply, p. 17). At the hearing on the motion, Plaintiff stated that the class "is all former shareholders of [May] from February 27, 2005,…which is the day that the merger was announced to the public, through August 30, 2005, which is the day that the merger was consummated." (transcript of hearing, p.5 (T.5)) This Court considers both of the latter two descriptions to describe the same class, interpreting it to mean all who continuously owned May stock from February 27 to August 30, 2005. Plaintiff excludes Defendants as potential members of the class.

or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
(D) the difficulties likely to be encountered in the management of a class action."

Rule 52.08 is identical to Federal Rule 23, and interpretations of the latter are considered in interpreting the Missouri rule. *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo.App. W.D. 1997).

"The burden to establish that the action complies with the requirements of Rule 52.08(b) rests entirely with the plaintiff." *Green, supra* at 878.

In support of his Motion for Class Certification, Plaintiff contends that the prerequisites of numerosity, commonality, typicality, and adequacy have been satisfied, pursuant to Rule 52.08(a).

In Plaintiff's memorandum in support of his motion, Plaintiff states "In addition to the mandates of Rule 52.08(a), Plaintiff must also satisfy 52.08(b) for class certification. Certification pursuant to Rule 52.08(b)(1) is appropriate here." At the hearing on Plaintiff's motion for class certification, Plaintiff's counsel stated that Plaintiff was asking the Court to certify the described class under Rule 52.08(b)(1). Therefore, in addition to the question of whether Plaintiff has satisfied the requirements of Rule 52.08(a), Plaintiff's motion also presents the question of whether this case presents a situation where there is a risk of inconsistent adjudications, or of adjudications that would impede members of the class who are not parties to protect their interests.

Plaintiff asserts that under Rule 52.08(b)(1), the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. Plaintiff further states that under Rule 52.08(b)(1), there is a risk that adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

Defendants oppose class certification and counter that this case is not manageable as a class action because it would violate the due process rights of the absent class members. Defendants also contend that Plaintiff's action fails to satisfy the other mandatory requirements for class certification imposed by Rule 52.08(a), and in particular the requirements of typicality and of adequacy of class representatives. Defendants also contend that the provisions of Rule 52.08(b)(1) were promulgated to protect the interests of the party opposing class certification; and Defendants contend that they are willing to waive the protections of the Rule; and that because they have waived their protection, certification of a class based on the provisions of Rule 52.08(b)(1) would be groundless.

To satisfy the numerosity requirement of Rule 52.08(a)(1), Plaintiff need not specify an exact number of class members, but "must show only that joinder is impracticable through some evidence or reasonable estimate of the number of purported class members." *Linquist v. Bowen*, 633 F.Supp. 846, 858 (W.D. Mo. 1986). Impracticability means that the joinder of all class members would be difficult or inconvenient. *Jackson v. Rapps*, 132 F.R.D. 226, 230 (W.D. Mo. 1990). Here, joinder of all persons who owned shares of May stock between February 27, 2005 and August 30, 2005 would be impracticable. This Court finds that the numerosity requirement of Rule 52.08(a) is satisfied.

A trial court must consider whether the named class representative has any conflicts of interest that will adversely affect the interests of the class. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 174 (Mo.App. W.D. 2006). The United States Supreme Court has indicated that the trial court must not only consider whether there is an actual conflict of interest, but also whether there is likelihood that such conflict may exist. *Id*. In order to determine whether the requirements for class certification found in Mo.S.Ct. Rule 52.08 are satisfied, the court must conduct a "rigorous analysis." *Gen.Tel.Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). The Missouri Supreme Court has declared that the provisions of Rule 52.08 were drafted to weigh considerations of due process for the absent members of the class, and considerations of fairness to the defendants to a class action suit. *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791, 794-795 (Mo. 1995).

One aspect of this Court's analysis is concerned with the question whether the other three requirements of Rule 52.08(a) for commonality, typicality, and adequacy have been satisfied by Plaintiff. This Court refers follows the principle set forth by the United States Supreme Court in *General Tel. Co. of the Southwest, supra* at 157, that the requirements for commonality and typicality tend to merge with the question whether the interests of the class members will be fairly and adequately protected by the class representatives in their absence."

Rule 52.08(a)(2) requires the presence of common issues of law or fact. Commonality is not required on every question raised in a class action, and the requirement is met when the legal question "linking the class members is substantially related to the resolution of the litigation." *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir. 1982). See also *Bradford v. AGCO Corp.*, 187 F.R.D. 600 (W.D. Mo. 1999). Thus, commonality is satisfied where there is a single issue common to all class members. *Rentschler v. Carnahan*, 160 F.R.D. 114, 116 (E.D. Mo. 1995).

Plaintiff contends that multiple common issues of law and fact exist, including:

1. whether Defendants breached their fiduciary duties of undivided loyalty or due care with respect to Plaintiff and the other members of the class in connection with the acquisition;

2. whether the individual Defendants breached their fiduciary duty to secure and obtain the best price reasonable under the circumstances for the benefit of Plaintiff and the other members of the class in connection with the acquisition;

3. whether the individual Defendants unjustly enriched themselves and other insiders or affiliates of May;

4. whether Defendants breached any of their other fiduciary duties to Plaintiff and the other members of the class in connection with the acquisition, including the duties of candor, good faith, and fair dealing; and

5. whether the merger between Federated and May should be rescinded; or, if rescission is impractical, whether Plaintiff and the other members of the class were injured as a direct and proximate result of the consummation of the acquisition and are entitled to equitable rescissory damages.

Plaintiff's allegations state questions of law and fact common to the class, in that Plaintiff and the other potential class members all purchased stock in May that was affected by the merger with Federated. This Court finds that the claims of potential class members would arise from the same course of alleged conduct by Defendants and would give rise to claims under the same legal theory as the claims asserted by Plaintiff; and that because Plaintiff's and other class member claims arise from the same conduct, the commonality prerequisite of Rule 52.08(a)(2) is satisfied in one aspect.

However, this Court finds that despite the shared basis for the claims, the commonality prerequisite is not fully satisfied, because there are facts underlying Plaintiff's claims which are not shared with other class members. These underlying facts make Plaintiff's claims subject to unique defenses that would not be applicable to other members of the class. This Court's reasoning relating to these underlying facts and the exposure to unique defenses is discussed and explained below.

In addition to the numerosity and commonality requirements, Rule 52.08(a) also requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." A class representative must possess the same interest and suffer the same injury as the class members. *Koger v. Hartford Life Ins. Co.,* 28 S.W.3d 405, 410 (Mo.App. W.D. 2000). The burden of satisfying the typicality requirement is "fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory. *Owner-Operator Indep. Drivers Ass'n*, 213 F.R.D. at 543.

In this context, commonality and typicality requirements tend to merge, acting as "guideposts for determining whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). It appears to this Court that the Supreme Court's reasoning implies that, at least with regard to certain situations, the three factors of commonality, typicality, and adequacy of protection of class members all are intertwined. Those three factors are set forth in Mo.S.Ct. Rule 52.08(a)(2), (3) and (4), and all must be established as prerequisites for eligibility for certification of a class, in addition to the numerosity prerequisite in Rule 52.08(a)(1).

This Court finds that under the facts of this case, the analysis of commonality, typicality, and adequacy are intertwined and must be analyzed together. In this case, this Court finds that Plaintiff's claims are not typical of the claims of other members of the class; that finding is intertwined with this Court's analysis of whether Plaintiff would fairly and adequately represent and protect the interests of the members of the class.

Rule 52.08(a)(4) states that the representative parties must "fairly and adequately protect the interests of the class." This prerequisite applies both to the named class representatives and to class counsel. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. 2004). A proposed class satisfies the prerequisite if the following elements are met: (1) the plaintiff's attorney must be qualified, experienced, and able to competently and vigorously prosecute the suit; and (2) the

interest of the class representative must not be antagonistic to or in conflict with other members of the class. *Fielder v. Credit Acceptance Corp.*, 175 F.R.D. 313, 320 (W.D. Mo. 1997).

Defendants argue that Plaintiff cannot adequately represent the absent class members because he is "personally and financially beholden to the law firm he proposes as class counsel in a way that could put the law firm's fees ahead of the absent class members' recovery."[4] Defendants assert that Plaintiff purchased his May shares at the suggestion of proposed class counsel and the entire lawsuit is driven by proposed class counsel. However, Defendants failed to adduce sufficient evidence at the hearing for this Court to conclude that those assertions are true.

Defendants contend that Plaintiff "will abdicate his responsibilities to the absent class members and allow the Coughlin firm to run this case as best suits its own interests."[5] However, Defendants also failed to adduce sufficient evidence at the hearing for this Court to conclude that those assertions are true.

Furthermore, there is no indication that Plaintiff has a lack of subjective interest in the case. A court must look at the willingness of the class representative to participate in the action. "This willingness, however, may be expressed merely by the class representative's compliance with discovery requests such as answering interrogatories or showing up for a deposition and answering questions." *In re Ins. Mgmt. Solutions Group, Inc.*, 206 F.R.D. 514, 517 (M.D. Fla. 2002). A class representative need not understand all the "intricate underpinnings" of the case. *Id*. In Plaintiff's deposition, Plaintiff was adamant that he knows substantially more than is necessary about the case to be a class representative, and that he has not abandoned control of the case. From the record before the Court, this Court finds that Defendants have failed to adduce evidence sufficient to cause this Court to conclude that Plaintiff has or will abdicate his responsibilities if he is selected as class representative.

Defendants note that Attorney David George, an equity partner in the proposed class counsel's Florida-based law firm of Coughlin Stoia Geller Rudman & Robbins LLP (Coughlin), is Plaintiff's close friend, attorney, and business associate. Defendants state that David George and Plaintiff are partners in a start-up company, where Plaintiff is a 40% owner and David George and his wife own the other 60%. Defendants state that Plaintiff's stake in this litigation, with his one hundred May shares, is "infinitesimally small compared to his stake in business ventures with George." Defendants argue that there is a real risk Plaintiff would choose the interests of David George, who would share in the attorneys' fees in the action, over the interests of the absent class members. However, with regard to these allegations, Defendants also failed to adduce sufficient evidence at the hearing for this Court to conclude that those assertions are true.

Defendants point to Plaintiff's deposition testimony where he states that he chose the firm to represent him based on his close relationship with David George and he has left significant decisions in the litigation up to the firm. As for Plaintiff choosing the Coughlin firm to represent him, it would be illogical to conclude that whenever plaintiff has a class-action type of claim, and also has a long-time, trusted-friend/business partner/attorney who is a partner in a firm that is very active among plaintiffs' class action firms in the United States, such a plaintiff must always be prohibited from turning to that firm for assistance in pursuing his claim, just because of the plaintiff's relationship with the friend/business partner/attorney in that firm.

---

[4] Defendant's memorandum in opposition to Plaintiff's motion for class certification, p. 9.

[5] Defendant's memorandum in opposition to Plaintiff's motion for class certification, p. 18.

While the cases cited by Defendants appear to hold that class attorneys and their relatives or business associates cannot act as class representatives, Plaintiff cites cases to the contrary. Defendants cite to *In re Discovery Zone Securities Litigation*, 169 F.R.D. 104, 108-09 (N.D. Ill. 1996), where proposed class representatives were stock brokers to the proposed class counsel. The *Discovery Zone* court found a conflict of interest as the stockbrokers had the possibility of receiving more investment business from class counsel and the brokers were in a position to render valuable investment tips to class counsel if their claims were given preferential treatment. *Id*. Defendants also reference *Susman v. Lincoln American Corp.*, 561 F.2d 86, 88 (7th Cir. 1977), which states "when the class representative is a close professional associate with the attorney of record in the cause, the class representative cannot adequately and fairly represent the class and certification should be denied."

Plaintiff, however, cites to several cases where the courts found a close relationship did not prohibit class certification: *In re Frontier Group, Inc. Sec. Litig.*, 172 F.R.D. 31, 43-44 (E.D.N.Y. 1997) (class representative, the niece of class counsel, was certified as an adequate class representative); *Fischer v. International Tel. & Tel. Corp*, 72 F.R.D. 170, 173-74 (E.D.N.Y. 1976) (defendants made no showing that class representative, who was the father of class counsel, had any interest in the fee recovered by class counsel if the case was successful); *Byrnes v. IDS Realty*, 70 F.R.D. 608, 613-14 (D. Minn. 1976) (class representative, an attorney who shared office space with the attorney representing him in the class action, was certified as an adequate class representative).

As noted in *Dale, supra*, Missouri's appellate courts have yet to rule on whether, as a matter of law, class attorneys and their relatives or business associates cannot act as class representatives. In the *Dale* case, the Missouri Court of Appeals Western District reasoned when determining the issue of whether a plaintiff will be an adequate representative of a proposed class, a case-by-case approach is most logical, focused on the particular circumstances of the case presented. In this case, this Court finds that the relationship between Plaintiff and Attorney David George, although a close one, is not so close given all the other circumstances such as to conclude that Plaintiff would abdicate his responsibilities to the other members of his class.

However, these questions – whether Plaintiff is personally and financially beholden to the law firm he proposes as class counsel; whether Plaintiff has a lack of subjective interest in the case; and whether Plaintiff's close professional association with an attorney who is a partner in the law firm that Plaintiff proposes as primary class counsel[6] would cause Plaintiff to fail to adequately represent the interests of all members of the proposed class – and the conclusions which this Court has reached with regard to each of those separate issues based on the evidence presented at the class certification hearing, does not end the analysis.

The analysis is not simply whether Defendants have established by evidence introduced at the hearing on class certification that any of those allegations is true. Rather, the question is whether Defendants have established by a sufficient showing at the hearing on class certification that those questions would be viable defenses against Plaintiff's own personal claim in the lawsuit, and whether it is likely that such defenses would play a major role in the litigation, which would impair Plaintiff's ability to successfully prosecute his action on behalf of all class members. There can also be the further question whether such questions would also impair the ability of the other members of the class to protect their own interests.

[6] Plaintiff's primary counsel is the Florida-based law firm of Coughlin Stoia Geller Rudman & Robbins LLP. As required by Missouri Supreme Court Rules, Plaintiff also proposes as local counsel the Missouri-based firm of Carey & Danis LLC.

In the Court's determination of the question of whether Plaintiff would be an adequate representative of all members of the proposed class, in the context of the requirements of Mo.S.Ct. Rule 52.08, if the Court determines that such issues would be viable defenses, and would likely play a major role in the litigation, then the conclusion is that Plaintiff is not meet the adequacy requirement to serve as class representative, and Plaintiff's claims are not typical of or in common with the claims of the other members of the class, the vast majority of whom would not be subjected to such unique defenses.

As cited in Defendants' response to the motion: "A proposed class representative is not adequate or typical if it is subject to a unique defense that threatens to play a major role in the litigation." *In re Milk Prods. Antitrust Litig.,* 195 F.3d 430, 437 (8th Cir. 1999); see also *Gary Plastic Packaging Corp. v. Merrill Lynch,* 903 F.2d 176 (2d Cir. 1990); and *J.H. Cohn & Co. v. American Appraisal Assoc., Inc.,* 628 F.2d 994 (7th Cir. 1980).

Defendants argue that this Court should find that Plaintiff is not an adequate class representative, because of the strong likelihood that he purchased his May stock in order to "buy" a lawsuit,[7] and that the evidence supporting this contention would subject Plaintiff to a unique defense that would play a major role in this litigation.

As Defendants have noted in their response, citing O*mnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169-70 (Del. Ch. 2002), *rev'd on other grounds,* 818 A.2s 914 (Del. 2003), Delaware courts have made it abundantly clear that public policy detests the purchase of a lawsuit; and that "this 'basic equitable principle' should be 'vigorously enforced.'"

Defendants note further that Plaintiff's motive in purchasing stock, when the motive is to buy a lawsuit, has been held to be a sufficient reason to deny class certification, because the plaintiff's motive would be a serious defense that would be likely to predominate the case, to the detriment of the members of the class, citing *Shields v. Smith,* No. C-90-0349 FMS, 1992 WL 295179, at *1 (N.D. Cal. August 14, 1992.)

Defendants introduced evidence of Plaintiff's telephone records, showing calls between him and the proposed class counsel's law firm just minutes before he called his broker to place an order for the one hundred May shares, strongly indicate that he did not purchase his May stock as a financial investment, but rather as an attempt to buy a lawsuit. Defendants further argue that Plaintiff's explanation that he purchased the stock in January 2005 because of May's strong holiday season is not credible in light of the fact that news media reports concerning May's holiday season indicated that May's performance had been weak rather than strong. Defendants argue this also shows Plaintiff's lack of credibility, which would further impair him as representative of the class, and cause him to be an inadequate class representative.

Plaintiff, in response, states that he was not solicited and did not purchase May stock to "buy a lawsuit." Plaintiff notes that the telephone logs showing calls between him and David George do not provide information as to who was on the phone during the calls or what was discussed. Plaintiff also remarks that the logs also show calls between Plaintiff and David George on numerous other occasions, and that the two men talk very frequently and have been doing so for many years, and therefore suggests this Court should conclude that the Defendants' contentions are without merit.

[7] To buy a lawsuit = to buy stock in a company for the purpose of filing a lawsuit concerning the company.

Defendants argue that this Plaintiff would be subject to unique defenses, different from other members of the class, because of Defendant's evidence that Plaintiff in this case bought the May stock in order to buy a lawsuit.

Plaintiff has presented an affidavit stating that he was not solicited by David George to purchase May stock and had not discussed his purchase of the stock with David George prior to his purchase. David George has also submitted a similar affidavit stating that he had not discussed the May stock with Plaintiff prior to Plaintiff's purchase. Further, the telephone record log only indicates that Plaintiff spoke with David George around the time he purchased May stock and gives no insight into the conversations had between Plaintiff and David George. The telephone calls only indicate a relationship between Plaintiff and David George. Both Plaintiff and David George state they have had a friendship since high school and a business and legal relationship for years and phone calls between them were common.

However, at the hearing Defendants presented evidence of the timing of Plaintiff's purchase of 100 shares of May Co. stock on January 21, 2005 – just four days after news accounts circulated concerning the renewal of speculation about a possible merger between May and Federated. The timing peculiar to Plaintiff's purchase of the stock is another factor which makes the facts underlying Plaintiff's claims different from the claims of other members of the class. Although the timing alone does not establish that it is more likely than not that Plaintiff purchased the stock for the purpose of bringing this lawsuit, the timing makes the Plaintiff a target for this unique defense of "buying a lawsuit."

Another issue which makes Plaintiff a target of unique defenses, and hinders his ability to act as an adequate class representative, is his failure to supply a plausible reason as to why he decided to purchase May stock at that time. In his deposition, Plaintiff stated that he made the purchase because May had a good sales performance during the Christmas holidays. However, Plaintiff produced no evidence to support that contention; on the other hand, Defendants showed that Plaintiff's assertion was contradicted by news reports that May in fact did not have a strong Christmas sales performance. Here again, the lack of a plausible explanation alone does not prove that Plaintiff had a different motive. But Plaintiff's possible motive of buying the stock to "buy a lawsuit" does make Plaintiff an even bigger target for that unique defense. Defendants' evidence establishes that this issue would likely play a major role in the litigation, and hinder Plaintiff's ability to adequately represent the class.

Finally, this suggestion that Plaintiff's motive in buying May stock was to "buy a lawsuit" is reinforced by the unexplained sequence of events between the Plaintiff's purchase of the stock and the initial filing by Plaintiff's counsel of the predecessor of this lawsuit challenging Defendants' actions[8] on February 28, 2005, later on the very same afternoon that the announcement was made by May and Federated that they had reached an agreement to merge.

What is particularly curious is the fact that there appear to have been no communications between Plaintiff and Plaintiff's counsel between the time that Plaintiff purchased his stock and the filing of the lawsuit. How could Plaintiff's counsel have possibly known that Plaintiff sought to challenge the merger, unless Plaintiff had advised his counsel that it was Plaintiff's intention back at the time he purchased the 100 shares to be in a position to file a lawsuit challenging the merger?

This suggestion is further reinforced by the contradictions in the explanation given by Plaintiff in his deposition about when he learned about the merger, which Plaintiff indicated was when he read

[8] Plaintiff's initial lawsuit was later dismissed; ultimately Plaintiff re-filed essentially the same claims in this lawsuit.

about it in the Providence, RI newspaper. But Plaintiff produced no evidence to rebut the reasonable inference raised by Defendants: that since the announcement of the merger occurred on February 28, 2005, a newspaper could not have included a report of the announcement until the next day – which would have been *the day after* the lawsuit was filed.

These further facts shown by Defendants at the hearing again do not prove that Plaintiff had such a motive. What these facts undoubtedly do establish is that Defendants will be able to attack Plaintiff's claims with this series of facts which are defenses uniquely directed at Plaintiff's claims, and that Defendants have enough evidence to ensure that such defenses will likely be a major factor in the litigation. Plaintiff's produced little evidence at the class certification hearing to counter such claims. The evidence Plaintiff did produce, his affidavit and that of Attorney George, are sufficient to make the question one of fact; however, Plaintiff's evidence falls far short of establishing that these unique defenses that Defendants have to challenge his claims would not likely be a major factor in the litigation.

This Court finds, on the question of whether Defendants have shown that Plaintiff would be an inadequate class representative because of susceptibility to the unique defenses raised by the sequence of events outlined above, that Plaintiff has failed to carry his burden to show that he would be an adequate class representative, and to show that his claims would be typical of the claims of other class members, and that the defenses against Plaintiff's claims would be common to the defenses asserted against the rest of the members of the class.

Although those findings are sufficient for this Court to deny the motion for class certification, this Court recognizes that it is possible this ruling will be appealed. Therefore, this Court will also address another issue raised by Defendants challenging whether Plaintiff has met the requirements of Rule 52.08 for certification of this case as a class action..

In addition to having the burden to show the requirements of Rule 52.08(a) have been met, Plaintiff must also show that a class action is the appropriate method through which to resolve this litigation, by showing that one of the alternatives set forth in Rule 52.08(b) has also been met.

In this case, Plaintiff has moved this Court to certify the proposed class under Rule 52.08(b)(1). That Rule states, in pertinent part:

> "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Plaintiff argues that Rule 52.08(b)(1) is applicable here, because Plaintiff is seeking equitable relief, and because the members of the class are situated similarly with respect to every issue of liability and damages, and to litigate the matters separately would create the risk of different standards of conduct and inconsistent rulings. Plaintiff states that his Petition seeks rescission or "equitable rescissory damages" if rescission is impracticable.

Defendants argue that Plaintiff has not established that the proposed class satisfies Rule 52.08(b)(1). Defendants state that Rule 52.08(b)(1)(A) cannot be used when the class predominately seeks money. Defendants assert that in this case, rescission is not a viable option given everything that has transpired regarding the merger, and that money damages are the only viable relief that could be awarded to Plaintiff or the other members of the class on Plaintiff's claims. Defendants also argue that in over two and a half years, no other May shareholder has sued the former May directors over the merger. Defendants also argue that they can waive Rule 52.08(b)(1)(A)'s protections since it is designed to protect defendants from inconsistent adjudications. As to Rule 52.08(b)(1)(B), Defendants note that Plaintiff has not shown how this case satisfies that subsection, and that Plaintiff pleads that he has met the requirements of Rule 52.08(b)(1)(B) merely by repeating the wording of the Rule in Plaintiff's pleading.

As mentioned above, Rule 52.08 is identical to Federal Rule 23, and interpretations of the latter are considered in interpreting the Missouri rule. *State ex rel. Byrd*, 956 S.W.2d at 377. Cases interpreting Federal Rule 23(b)(1)(A) state that Federal Rule 23(b)(1)(A)'s primary concern is the prejudicial effect that inconsistent judgments may have <u>on the party opposing the class</u>. Federal Rule 23(b)(1)(A) should only apply to certain unique situations. *Corley v. Entergy*, 222 F.R.D. 316, 320 (E.D. Tex. 2004). The "rule exists to protect <u>the party opposing class certification</u>: often, the defendant." *Id* (emphasis added).

Defendants here argue that a defendant seeking to defeat class certification when it is sought pursuant to Rule 52.08(b)(1)(B) may waive his or her right to the safeguards that Rule, which is identical to Federal Rule 23(b)(1)(A). Some courts have held that, in such a situation where a defendant contesting class certification waives his or her right to the safeguards of Rule 23(b)(1)(A), class certification under that Rule is improper. *Pettco Enters., Inc. v. White*, 162 F.R.D. 151, 155 (M.D. Ala. 2005); *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 190 F.R.D. 422, 427 (D. Tex. 1999); *Fogie v. Rent-A-Center, Inc.*, 867 F.Supp. 1398, 1403 (D. Minn. 1993); *Chmieleski v. City Products Corp.*, 71 F.R.D. 118, 155 (W.D. Mo. 1976); *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89, 92 (N.D. Cal. 1972).

As pointed out by Plaintiff, Professor Hubert B. Newberg is of a different opinion about the appropriateness of certification in these circumstances. *Newberg on Class Actions*, § 4.7 (4th ed. 2007). Prof. Newberg states that "the Advisory Committee Notes to Rule 23 contain no support for the view that the party opposing the class is the exclusive beneficiary of subdivision(b)(1)(A)."

Here, this Court agrees with Professor Newberg's analysis, that Defendants cannot avoid class certification otherwise fitting within the requirements of the Rule merely by the Defendants' waiver of the protections of Rule 52.08(b)(1)(A).

However, againt that does not end the analysis. Here, this Court finds that Plaintiff has not provided a compelling argument that the prosecution of separate actions by individual members of the proposed class would create a risk of inconsistent or varying adjudications or adjudications which would be dispositive of the interests of the other members not parties to this case, or that would substantially impair or impede the ability of those other parties to protect their interests.

This Court finds that rescission of the merger would be impossible; and therefore Plaintiff's prayer for relief in the form of rescission of the merger is of no value in evaluating whether Plaintiff properly brings this action as a class action.

Additionally, the Court finds that Plaintiff has not presented any evidence that the proposed class satisfies Rule 52.08(b)(1)(B).

As Plaintiff's action fails to satisfy the requirements of Rule 52.08(a) and of Rule 52.08(b)(1), his Motion for Class Certification and Certification of Class Representative must be denied.[9]

One other issue addressed by the parties was the question whether Plaintiff's counsel should be certified as counsel for the class. Ordinarily that is a question that the Court must address in hearing a motion for class certification, because not only must Plaintiff be an adequate representative of the proposed class, but Plaintiff's counsel must also be qualified to adequately serve as counsel representing the interests of both Plaintiff and of all the other members of the proposed class, without any conflict of interest.

In this case, Plaintiff's evidence that Plaintiff's counsel was qualified to serve as class counsel was sufficient to establish a *prima facie* case that Plaintiff's counsel was qualified. Defendants did not present sufficient evidence to overcome Plaintiff's showing. However, since the motion for class certification is denied, the issue of whether Plaintiff's counsel should be approved as counsel for the class is moot.

After the hearing on the motion for class certification, the Court granted Defendants' motion to postpone the deadlines for discovery and other matters set forth in the scheduling order that had been entered, pending a ruling on the class certification motion. Later, the parties appeared for a status conference, and the Court indicated that it would set a further status conference to consider scheduling matters at the time the Court issued its ruling on the class certification motion.

ORDER

WHEREFORE, the Court orders that Plaintiff's Motion for Class Certification and Certification of Class Representative is denied.

The Court sets this case for a status conference with counsel for the parties to consider proposed revised scheduling orders to be submitted by the parties, including a proposed trial date, with the status conference to be held on August 20, 2009, at 9:00 a.m.

The Clerk shall mail or give a copy of this Order to:

1. James J. Rosemergy, Carey & Danis LLC,
   8235 Forsyth Blvd, Suite 1100,
   Saint Louis, MO 63105,
   Attorneys for Plaintiff.
2. Thomas C. Walsh, Bryan Cave LLP,
   One Metropolitan Square, 211 North Broadway, Suite 3600
   Saint Louis, MO 63102,

[9] The Court, at this time, makes no determination as to whether Plaintiff's proposed class would satisfy the requirements of Rule 52.08(b)(2) or (3), as Plaintiff has not moved for certification under those subsections.

Attorney for Defendants.

SO ORDERED:

_____
EDWARD SWEENEY, MBE #24064
Circuit Judge